TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 175

MARCUS HAUGE, APPELLANT,

vs.

THE CITY OF CHICAGO

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

FILED JULY 9, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 175

MARCUS HAUGE, APPELLANT,

vs.

THE CITY OF CHICAGO

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

INDEX.

	Original	Print
Proceedings in Supreme Court of Illinois	1	1
Caption (omitted in printing)	1	
Abstract of record from Municipal Court of Chicago	2	1
Complaint and order thereon	5	1
Order granting leave to file complaint, etc.	6	2
Petition for change of venue	7	2
Order transferring cause	7	2
Order setting cause	7	3
Certificate for appeal	7	3
Defendant's proposition of law	8	3
Finding and judgment	8	3
Notice of appeal	9	4
Bond on appeal	10	5
Notice and præcipe for record	11	6
Præcipe for additional parts of record	12	6
Orders extending time	13	7
Order approving bill of exceptions	13	7
Order approving report of proceedings	14	7
Report of proceedings	14	8
Caption	14	8
Testimony of Robert Hickey	15	8
Testimony of Harold Olson	16	10
City Exhibit 1—Bill for coal	18	11

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 28, 1936.

—8340-C

	Original	Print
Abstract of record from Municipal Court of Chicago—Continued.		
Report of proceedings—Continued.		
Testimony of Frank A. Lanser	19	12
Marcus Hauge	20	13
Ralph C. McElvain	26	17
Motion for proposition of law	31	20
Colloquy	32	21
Ordinances of City of Chicago relating to weights and measures	40	27
Stipulation as to report of proceedings	59	42
Clerk's certificate	60	42
Order as to briefs	62	43
Excerpt from appellant's brief.....(omitted in printing)	63	
Order of submission	64	44
Opinion, Herrick, J.	65	45
Judgment	72	52
Petition and suggestions of amicus curiæ that a rehearing be granted	74	53
Affidavit of mailing	80	57
Notices of filing petition and suggestions re granting of rehearing.....(omitted in printing)	82	
Notice of petition for rehearing	85	57
Recital as to filing of petition for rehearing	87	58
Petition for rehearing.....(omitted in printing)	88	
Dissenting opinion, Shaw and Stone, JJ.	108	59
Order denying rehearing, etc.	110	61
Order staying mandate.....(omitted in printing)	112	
Assignments of error	114	61
Petition for appeal	118	62
Order allowing appeal	127	67
Supersedeas bond on appeal.....(omitted in printing)	131	
Citation and service.....(omitted in printing)	136	
Præcipe for transcript of record.....(omitted in printing)	140	
Notice of filing of præcipe	146	69
Appellee's præcipe for additional record	149	70
Notice of appellee's præcipe.....(omitted in printing)	151	
Joint brief and argument for appellants	155	70
Brief and argument for appellee	180	87
Joint reply brief and argument for appellants	211	108
Clerk's certificate.....(omitted in printing)	229	
Statement of points to be relied upon and designation as to printing record	230	108
Appellee's designation of parts of record to be printed	236	112

[fol. 1] [Caption omitted]

[fols. 2-4] [File endorsement omitted]

[fol. 5]

IN SUPREME COURT OF ILLINOIS

OCTOBER TERM, A. D. 1935

CITY OF CHICAGO, Appellee,

vs.

MARCUS HAUGE, Appellant

Appeal from Municipal Court of Chicago

Honorable Frank M. Padden, Judge Presiding

Abstract of Record—Filed September 11, 1935

Placita

QUASI-CRIMINAL COMPLAINT—Filed March 5, 1935

STATE OF ILLINOIS,
City of Chicago,
First District, ss:

The Municipal Court of Chicago

Robert Hickey being first duly sworn, on his oath, on information and belief deposes and says that Marcus Hauge, 1220 N. Liberty St. Morris, Ill. of said City of Chicago, on the 4th day of Mar. A. D. 1935, at the City of Chicago, [fol. 6] aforesaid, Making coal delivery without the proper seal for same in violation of Section 2947 of the Revised Chicago Code of 1931.

Robert E. Hickey.

Subscribed and sworn to before me this — day of —— A. D. 19—. Joseph L. Gill, Clerk of The Municipal Court of Chicago.

I have examined the within complaint and the person presenting the same, and have heard evidence thereon, and

am satisfied that there is probable cause for filing the same. Leave is given to file said complaint and It Is Ordered that a warrant issue against the accused.

F. M. Padden, Judge of The Municipal Court of Chicago.

ORDER GRANTING LEAVE TO FILE COMPLAINT, ETC.—March 5, 1935

Judge Eugene Holland

On motion of Robert Hickey, in the name of the plaintiff herein, and the presiding Judge having examined said complaint and having examined under oath the person presenting it and being satisfied that there is probable cause for filing the same, ordered that leave is hereby granted to file said complaint instanter.

It appearing to the Court that defendant was arrested without warrant, etc., and is present in open court, the Court takes jurisdiction of the person of the defendant and the bailiff is ordered to take such defendant into his [fol. 7] custody so that the bailiff may have him before this Court to answer to the plaintiff concerning the offense charged in said complaint.

It is ordered that this cause is set for trial March 19, 1935.

Appearance entered March 5, 1935:

Enter the appearance of the defendant, Marcus Hauge, and my appearance as his attorney: Thomas C. McConnell, attorney for defendant.

PETITION FOR CHANGE OF VENUE—Filed March 19, 1935

Said petition, under oath, prayed a change of venue from Judge Eugene Holland because the defendant feared that he would not receive a fair trial because said Judge is prejudiced against him.

ORDER TRANSFERRING CAUSE—March 19, 1935

Judge Eugene Holland

It is ordered that this cause be transferred to the Chief Justice for assignment or such other disposition as he may deem proper.

ORDERS SETTING CAUSE

Order entered March 19, 1935: Judge John J. Sonsteby: Set for trial in Room 1120, 2:00 P. M.

Order entered March 19, 1935: Judge Frank M. Padden: It is ordered that this cause is hereby postponed and set for trial March 20, 1935.

CERTIFICATE FOR APPEAL DIRECTLY TO THE SUPREME COURT—Filed March 20, 1935

I, Frank M. Padden, presiding judge, hereby certify pursuant to section 75 of the Civil Practice Act that in the above entitled cause the validity of a municipal ordinance [fol. 8] is involved and that in my opinion the public interest requires a direct appeal to the Supreme Court.

Signed this 20th day of March, 1935.

Frank M. Padden, Judge.

PROPOSITION OF LAW—Filed March 20, 1935

The above defendant requests the Court to hold the following to be the law of this case:

The burden of proof is on the plaintiff, City of Chicago, to show that the sale of the coal involved in this proceeding to the person or persons receiving said coal from the defendant's truck took place within the corporate limits of the City of Chicago, and if the Court finds from the evidence that the said sale of the said coal took place outside of the corporate limits of the City of Chicago, then the finding of the Court should be for the defendant.

Marked "Refused, F. M. Padden, Judge."

FINDING AND JUDGMENT—Entered March 20, 1935

Judge Frank M. Padden

The said defendant being duly advised by the Court as to his right to a trial by jury in this cause, elects to waive a trial by jury, and this cause is, by agreement in open

court between the parties hereto, submitted to the Court for trial without a jury.

Now come the parties to this cause, and thereupon this cause comes on in regular course for trial before the Court without a jury, and the Court having heard the evidence, and the arguments of counsel, and being fully advised in the premises enters the following finding, to wit:

"The Court finds the defendant guilty of a violation of [fol. 9] the ordinance described in the complaint herein and assesses a fine against said defendant in the sum of Seventy Five and No/100 Dollars ($75.00)."

This cause coming on for further proceedings herein, it is considered by the Court that the plaintiff have judgment on the finding herein of the Court, it appearing to the Court that said defendant has duly and regularly waived a jury trial in this cause, and it is considered by the Court that the plaintiff have and recover of and from the defendant a fine in the sum of Seventy-Five and No/100 Dollars ($75.00), in form as aforesaid assessed, and also the costs of this suit taxed at $10.00, and that execution issue for the amount of said fine and costs. And it appearing to the Court that said fine accrued to the plaintiff in consequence of the violation by the defendant of the ordinance of the plaintiff described in the plaintiff's statement of claim herein, known as Section No. 2947, the Court finds that it has jurisdiction of the subject matter of this cause, and of the parties hereto, and that said defendant has been duly and regularly convicted of the violation of said ordinance according to law, and that any person convicted of a violation of said ordinance, may under the law, be imprisoned in the House of Correction of said city, for non-payment of any fine imposed for such violation.

It is ordered by the Court that execution herein be and hereby is stayed to March 26, 1935.

Appeal bond, $200—thirty days.

NOTICE OF APPEAL—Filed March 25, 1935

The above named defendant, Marcus Hauge, hereby appeals to the Supreme Court of Illinois from the judgment [fol. 10] rendered against him and in favor of the City of

Chicago, plaintiff, in the above entitled cause heretofore, to-wit, on the 20th day of March, A. D. 1935.

Said appellant prays that the Supreme Court of Illinois will reverse said judgment without remanding or grant to the appellant such other or further relief as to the said Supreme Court shall seem just.

Marcus Hauge, by Thomas C. McConnell, His Attorney.

Notice filed March 27, 1935:

To Honorable Wm. H. Sexton, Attorney for Appellee:

Notice of filing notice of appeal.

On March 25, 1935, I filed with the Clerk of the Municipal Court of Chicago a notice of appeal from the judgment rendered herein, copy of which notice I hand you herewith.

Thomas C. McConnell, Attorney for Defendant-Appellant.

Received a copy of above notice and of notice of appeal therein mentioned, this 25th day of March, 1935.

William H. Sexton, Corporation Counsel, Attorney for City of Chicago, Appellee.

APPEAL BOND

Said bond signed by Marcus Hauge, as principal, and United States Casualty Company, a New York corpora-
[fol. 11] tion, as surety, is in the penal sum of $200, is dated March 25, 1935, recites the judgment obtained against said Marcus Hauge by the City of Chicago for the sum of $75 and costs of suit on March 20, 1935, and that said Hauge has perfected an appeal to the Supreme Court of the State of Illinois from said judgment and is conditioned to be void if the said Hauge shall duly prosecute his said appeal to effect and pay the amount of the judgment, interest, damages and costs rendered and to be rendered against said Hauge in case the said judgment shall be affirmed.

It is endorsed: "Approved by me this 1st day of April, 1935. (Signed) Frank M. Padden, Judge."

Notice of appearance filed April 4, 1935:

City of Chicago, a municipal corporation, plaintiff-appellee, appears in this appeal by William H. Sexton, cor-

poration counsel, and Michael L. Rosinia, prosecuting attorney.

Received a copy of the foregoing notice this 4th day of April, 1935.

Thomas C. McConnell, Attorney for Defendant-Appellant.

NOTICE OF FILING PRÆCIPE AND PRÆCIPE—Filed April 6, 1935

To Honorable Wm. H. Sexton, Attorney for Appellee:

Please take notice that on April 4, 1935, we shall file with the Clerk of the Municipal Court of Chicago a præcipe [fol. 12] for record, a copy of which is handed you herewith.

Thomas C. McConnell, Attorney for Defendant-Appellant.

Received copies of the above notice and præcipe for record therein referred to, this 3rd day of April, A. D. 1935.

William H. Sexton, Attorney for Plaintiff-Appellee.

The præcipe is signed by the attorney for the defendant-appellant and is directed to the clerk of the Municipal Court of Chicago, requesting him to prepare a transcript of record for filing in the Supreme Court of Illinois, the specific items of which are here omitted in printing because the effect of such præcipe and of the præcipe for additional parts of the record, filed April 6, 1933, by the attorneys for the City of Chicago, appellee, requires the preparation of a complete transcript of record.

Item No. 15 of appellant's præcipe is as follows:

"15. All original reports of proceedings hereafter filed herein (if an order be entered or stipulation be filed to use such originals); otherwise insert copies of all such reports of proceedings."

PRÆCIPE FOR ADDITIONAL PARTS OF RECORD—Filed April 6, 1935

Said præcipe is signed by the attorneys for the appellee, City of Chicago, and bears a receipt of the attorney for the

defendant-appellant for a copy of said præcipe, and requests the clerk of the Municipal Court of Chicago to in-
[fol. 13] clude in the transcript of record for filing in the Supreme Court of Illinois on appeal, the following:

1. Notice of appearance of plaintiff-appellee, City of Chicago, filed April 4, 1935.

2. All orders, notices, pleadings, papers and documents filed or entered in said cause not otherwise specified in this præcipe and the præcipe for record heretofore filed herein by defendant-appellant.

3. This præcipe.

ORDERS EXTENDING TIME

Order entered May 22, 1935: Judge John J. Sonsteby:

By agreement of the parties hereto, it is ordered by the Court that the time for defendant to file report of proceedings on trial be and the same is hereby extended to and including June 23, 1935.

Order entered June 22, 1935: Judge John J. Sonsteby:

By agreement of the parties hereto, it is ordered by the Court that the time for filing report of proceedings in this cause be and the same is hereby extended to July 8, 1935.

Order entered July 8, 1935: Judge John J. Sonsteby:

Bill of exceptions presented.

ORDER APPROVING BILL OF EXCEPTIONS

Order entered July 8, 1935: Judge Frank M. Padden:

It is ordered by the Court that the bill of exceptions presented herein be and the same is hereby approved, and ordered filed.

[fol. 14] ORDER APPROVING REPORT OF PROCEEDINGS

Order entered July 8, 1935: Judge Frank M. Padden:

On motion of the said defendant,

It Is Ordered that the report of proceedings submitted by defendant is hereby approved, signed and ordered filed

herein and that the said original report of proceedings in lieu of a copy may be inserted in the transcript of record of this cause for all purposes of review of this cause by the Supreme and Appellate Courts of this state.

Report of Proceedings—Filed July 8, 1935

Stenographic report of the testimony taken and the proceedings had on the trial of the above entitled cause, before the Honorable Frank M. Padden, one of the Judges of said court, commencing on the 19th day of March, A. D. 1935.

Present:

Mr. David Lefkovits, special assistant city prosecutor, on behalf of the City of Chicago.

Messrs. Babcock, Gilruth, Beck & McConnell, by Mr. Thomas C. McConnell and Mr. Owen Rall, on behalf of defendant.

(Whereupon the City of Chicago, to maintain the issues on its behalf, introduced the following evidence, to wit:)

The Court: City of Chicago v. Marcus Hauge.

Mr. Lefkovits: This is also a violation of Section 2947 of the Municipal Code of Chicago and the penalty thereunder is provided in Section 2957; that they had no public weighmaster's certificate attached.

The Court: Proceed.

[fol. 15] Robert Hickey, a witness on behalf of the City of Chicago, being first duly sworn, testified as follows:

Direct examination:

By Mr. Lefkovits:

My name is Robert Hickey, and I am employed in the city sealer's office in the capacity of deputy inspector, weights and measures. I have been with the city sealer for quite a few years.

On March 4, 1935, I did have occasion to follow a truck driven by Marcus Hauge. We followed this load of coal from Ogden and Cicero to 2005 West Cermak Road, where Mr. Hauge of Morris delivered one ton of egg lump coal. I asked him for the delivery certificate.

I did not have any conversation with him before he unloaded his coal. I had a conversation after he started to unload his coal. I asked him for his ticket and he showed that he had seals of the Morris Mining Company on his ticket. He gave me his ticket at the time.

City Exhibit 1, which I have inspected, does not have on it a public weighmaster's seal of the City of Chicago. There is a seal on there of the Morris Mining Company. I asked him whether or not he had a public weighmaster's seal of any weighmaster in the City of Chicago, and he said no. That is about all we talked about.

I talked to the purchaser of the coal. It was in the presence of Mr. Hauge. I just asked him if he bought the coal from this Mr. Hauge and he said yes; he had been buying coal from time to time.

[fol. 16] I observed whether or not payment was made at that time for the coal; a cash payment. I believe the customer's name is on the report. Let me see if I am familiar with it. Mr. Tresca.

I saw Mr. Tresca pay Mr. Hauge for the coal at that time. All this happened in the City of Chicago, County of Cook and State of Illinois.

Cross-examination.

By Mr. McConnell:

As near as I can come to the exact words that were used by the purchaser in that conversation, I asked him if he had been buying coal from this man and he said yes. That is about all. I just explained the situation to the customer, just what had happened.

(Witness excused.)

HAROLD OLSON, a witness on behalf of the City of Chicago, being first duly sworn, testified as follows:

Direct examination:

By Mr. Lefkovits:

My name is Harold Olson. I am employed by the Chicago Better Business Bureau.

On March 4, 1935, I was with Mr. Hickey. I followed a truck driven by Marcus Hauge. I could not recall any conversation that took place just as Hauge was unloading that particular coal. I cannot say that I do remember any of it at all.

I was present when the delivery ticket was turned over. I asked Mr. Hauge some questions about a weighmaster's certificate at that time. I asked him whether he had a [fol. 17] weighmaster's seal and he showed me the certificate. Also asked if he had any other weighmaster's certificate of the City of Chicago. He said he did not. All this conversation took place in the City of Chicago.

Cross-examination.

By Mr. McConnell:

I am employed by the Chicago Better Business Bureau. The occasion for my being present at that time was that myself and one or two other employees of our bureau had been working with the city sealer's office, that is, men of the city sealer's office, or deputies. My superior, Mr. E. R. Peterson, requested me to do that. He is not connected with the Retail Coal Merchants Association in any way. I do not know who asked the Better Business Bureau to interest t! mselves in this matter.

Mr. Lefkovits: May I make an objection to this line of testimony?

The Court: Sustained. That is going too far.

Mr. McConnell: That is all.

(Witness excused.)

[fol. 18] (Whereupon, without objection, the document referred to marked City Exhibit 1 was offered and received in evidence and is in words and figures following:)

CITY EXHIBIT 1

Morris Coal & Mining Co.

Jct. U. S. No. 6 and Ill. No. 47

Morris, Illinois

Phone: Morris 80

Morroco Coal

Mined the Day You Get It

Direct From Mine to You—Any Quantity—Any Place—By Truck

Morris, Ill., 3/4 1935.

Name: W. Burgess.
Street .....
City .....

Kind ..Lump ..... @ ....per ton....
..... @ ....per ton....
Gross ..13420 ..... lbs. .....
Tare ..5420 ..... lbs. .....
Net ..8000 ..... lbs. .....
Tax Expense .....
Labor .....

Time ..... Total .....
Remarks .....
Driver ..Hauge..... Salesman .....
Weighed by..NHB..... Public Weighmaster

This Is To Certify That the herein described material was weighed by a Public Weighmaster, and the seal at-[fol. 19] tached hereto is a recognized authority of accuracy as prescribed by Section 4204 of the Chicago Municipal Code of 1922, as amended Dec. 16, 1925 and Jan. 21, 1926.

Terms Cash on Delivery

All Claims Must Be Reported to Office Within 48 Hours

Ticket Number 2323-2153-2082.
No. 19311. Rec'd by —— ——.

(End of Exhibit.)

FRANK A. LANSER, a witness on behalf of the City of Chicago, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lefkovits:

My name is Frank A. Lanser. I am employed by the City of Chicago, Department of Weights and Measures, in the capacity of chief deputy inspector. I have charge of the records of all of the registered public weighmasters. I did have occasion to look up my records as to whether or not the Morris Coal Mining Company is a registered licensed public weighmaster in the City of Chicago, and they have no such license. They were not so licensed during the year 1935.

[fol. 20] Cross examination.

By Mr. McConnell:

I had no occasion to look up whether they were licensed during the year 1934. I looked up for the year 1935 and found they have no license for the year 1935.

Q. Do you know of your own knowledge that they were licensed in the year 1934?

Mr. Lefkovits: That is objected to as immaterial.

The Court: Sustained. Objection sustained. It is immaterial.

Mr. McConnell: You were formerly with the Better Business Bureau, weren't you?

Mr. Lefkovits: Objected to.

The Court: Objection sustained.

Mr. McConnell: That is all.

(Witness excused.)

(The City of Chicago here rested its case.)

(Whereupon the defendant, to maintain the issues on his behalf, introduced the following evidence, to wit:)

MARCUS HAUGE, the defendant, a witness on his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. McConnell:

My name is Marcus Hauge. I live at Morris, Illinois. My business is hauling coal for customers here in Chicago. [fol. 21] Referring to a certain conversation which has been testified about here, I cannot quite recall the name of the purchaser of this coal. It is a foreign name. It is hard to remember.

I don't remember whether I hauled for him or not before this time that has been testified about. I hauled for other people in Chicago. Not that I remember, did he ever talk to me about ordering any coal. I could not just really say whether he had himself talked to me at any time about ordering any coal. I might have seen him before that time; I don't remember.

I do not have any office any place. I got this particular load of coal in Morris, Illinois. I got orders there to load my truck at that time, sent there through the mine. I was not receiving any commission on the sale of any coal; only from the customer that paid me for hauling coal.

I received from the customer in the way of money $2.50 on a single ton and $2.00 on a two ton lot. That money goes to me. That money—that charge—was my money for my time in hauling the coal. I own the truck that I drive. I did not buy any coal that day myself. I get the coal there at the mine (Morris Coal and Mining Company) and I pay them for the coal.

I don't remember whether the customer here in this case said in my presence that day that he had bought the coal from me. I heard the witnesses testify here. I don't remember now any such conversation as that.

Q. Did you, as a matter of fact, sell any coal to this customer that day?

A. Yes, I delivered coal there.

[fol. 22] Q. Did you sell any? Was it your coal?

A. Yes, it was my coal.

Q. Did you buy the coal from the Morris Coal and Mining Company?

Mr. Lefkovits: He said he did. Now counsel is going over the same questions.

The Witness: I get the orders from the mine and I haul it up to the customer.

Mr. McConnell: Who are you working for? Who are you employed by in hauling that coal?

The Witness: I am employed by the customer.

The customer pays my charge. I weighed this coal before I left Morris.

Q. Just tell the Court how that coal was weighed.

A. I had a split load. For instance, if I have a ton on to be unloaded first, I weigh up the ton and load it up with each separate lot, one ton, two tons and three tons.

I weigh empty first, and then the load.

I was not weighed by the city inspector. They did not weigh me. I asked if they wanted to weigh it and they said no, they knew our weights were right and they didn't want to bother us with it. The sealer who stopped me said that.

Q. The money that you received from this customer, how much of that money did you have as your own?

Mr. Lefkovits: That is objected to.

The Court: Overruled.

The Witness: $2.50.

That was for trucking, for my work.

[fol. 23] Cross examination.

By Mr. Lefkovits:

I could not exactly say that I knew Mr. Tresca, the purchaser, before this time.

There was an order sent down to deliver coal to him. I don't remember who sent the order. It is sent down to the mine. I imagine Mr. Tresca sent the order down to the mine. This customer sent the order down to the mine.

Q. And then you went to the mine and they said there was an order there, is that right, for coal?

A. That is the way I usually get my orders, being sent down there.

I paid for the coal at the mine. The customer pays me when I deliver it.

Q. First you pay for the coal at the mine; it is weighed, and then you pay them. Isn't that correct?

The Court: Do you pay for the coal before it is taken away?

The Witness: I pay them afterwards.

I have an account with the mine.

Mr. Lefkovits: In this particular instance, on direct examination you said you paid for the coal at the time they weighed it in at the mine, is that right?

The Witness: No, not always.

Q. I am talking about this particular delivery?

A. No.

I have a credit account with the coal company. I do not merely add my trucking bill on to the price of the coal when I sell it to the customer. I sell the coal and then they pay me for the hauling. The customer pays me for the hauling. [fol. 24] The price of our coal in question is $6.00 for lump and egg, except in single tons; then we charge fifty cents extra for single ton deliveries.

Q. How much do you pay for it at the mine? $2.50?

A. $4.00.

Q. $4.00 at the mine?

A. Yes.

I don't remember what individual at the mine called my attention to this order. I don't really recall his name. That ticket was given me by a fellow who has an office here, who sends it down. The name of the company or agency here is Burgess. Burgess is connected with himself. He takes the orders from the customers here in Chicago. I don't remember whether he did in this particular case.

Q. Don't you know who gave you this ticket?

A. It was sent down to the mine.

I could not say who sent it down. Nobody at the mine gave me this ticket and told me to deliver it, just left it there for me. They didn't say where it came from.

The name on here is filled out to Burgess; Burgess' name is on it.

Burgess has got it made out to Tresca; not this particular bill I got at the mine, but the one he has got is billed out to the customer.

This ticket is made out for a full load. I did not deliver a full load to this particular party. There were other customers, either two or three on the same load. I could not remember the name of who else I delivered to besides Tresca at that time. I can't remember now where I delivered the other two loads on that same truck. I delivered two tons [fol. 25] to one and one ton to another, four tons altogether. They paid me.

All of this coal was not just dumped onto the truck. They had dividing boards in for split loads. I had three dividing boards at that time. I can't recall now who I delivered the other two loads to. The customer paid me for these deliveries. It is not always the fact that I never heard of the customer before, and that I was just told to go over there through Burgess. In this particular instance, I don't remember.

Re-direct examination.

By Mr. McConnell:

I don't have any account in my own name with the Morris Coal and Mining Company.

The Court: How do you pay for the coal then? Do you pay them cash or do you have an account, or do you settle up at the end of the month, or what do you do?

The Witness: Usually through Burgess' office. I pay Burgess for the coal. The customer pays me for hauling it.

Burgess does not pay a certain price to me for the coal. I know what the market price of coal is.

Mr. McConnell: You do not yourself buy any coal, do you?

The Witness: No, I do not buy the coal.

What I do is to go down there every morning at the mine and wait for a- order for a load, and I get those orders there at the mine. I don't pay any money then for the coal. The only money I ever pay at any time is after the delivery and after I have received this money from the customer. That money does not belong to me.

[fol. 26] The Court: You are working for this company?

The Witness: No, I work for the customer.

The Court: That is enough. That is clear.

Recross examination.

By Mr. Lefkovits:

I pay Burgess for the coal afterwards. He has an office here in Chicago. The name on his office door is Tropic-Air Coal Company.

Mr. McConnell: The only money you get at any time is for hauling the coal?

The Witness: Yes.

(Witness excused.)

RALPH C. MCELVAIN, a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. McConnell:

My name is Ralph C. McElvain. I live at Morris, Illinois. Before that I lived in Evanston, Illinois. I lived in another place downstate; I was born in Auburn, Illinois. Most of my life my business has been coal mining. I had run strip mines before I had this Morris Coal and Mining Comp[any]. We ran in southern Illinois and here.

My present business is mining coal and selling it. I am president of the Morris Coal and Mining Company that has its principal place of business at Morris. Their business in Morris is strip mining and selling coal.

Q. Can you just tell the Court how the coal is sold? You have heard the testimony of the witnesses here. Will you [fol. 27] just state to the Court how these transactions are handled on the records of your company in Morris?

Mr. Lefkovits: I object.

The Court: He may answer.

The Witness: We sell coal to the customer. We have trucks around there that deliver the coal and collect for it. They collect the money for the coal, as well as for their own hauling. The customer pays them for hauling and also pays them for the coal, and they pay us, turn the money

back in to us when they get back. Then we also have offices which are brokers for us.

We always considered the customer employs these truckers. We certainly do not employ them. We do not pay them any wage or salary of any kind whatever. They come from all over the county. They own their own trucks.

The Court: Do you get orders that you turn over to them or do they bring their own orders?

The Witness: Some of the offices send orders down and we get orders too.

When we do get orders we turn them over to the trucker and he delivers the coal; that is, any trucker that might come along that does business with us.

Mr. McConnell: And this trucker that takes that coal, he keeps all of the charge for delivering the coal, is that right?

The Witness: Yes.

We don't keep books of any trucker whatever, in no way, shape or form. We never see a nickel of the money that [fol. 28] he makes. As to whether he pays cash ordinarily at the mine—he does not pay anything. We give him an order to go out. Some customer gives us an order and we turn it over to him, to get so many tons of coal. He gets the coal and delivers it and brings the money back, everything except his hauling from the mine. We do make a definite price at the mine for the coal.

That coal is sold, I would say, f. o. b. the mine. That is the way we handle it.

We have had a city seal from the City of Chicago. At one time we had it. They failed to renew it this year. We made application.

We have a scale down there at the mine at Morris. That scale is inspected by the Bureau of Weights and Standards of the State of Illinois. It has been inspected recently; it has been inspected this year. They come around every couple of months or so, something like that.

When I say that we weigh these trucks, I mean that our procedure is to weigh it empty. We put their name and their weight down in a book. If the order calls for a straight load, as we call it, a four or five ton load, they put it on and weigh up again. We always allow plenty, so nobody is going to get caught short weighting. We put overweights on.

If instead of a straight load they should have maybe three tons and a single ton, they put on their three tons and weigh it on and then put on their single ton and weigh it up, and they get a ticket for each one.

Reweighing this coal in the City of Chicago would mean in the way of price on this particular coal that it would probably cost the customer from fifty to seventy-five cents, [fol. 29] and in some cases a dollar more per ton. This is not exactly the cost of weighing, because, if we could get a seal in here, we would have to establish a yard, which would run the cost up needlessly.

I mean that we would have to take the coal off the load; it is the handling charge of the coal that I am talking about.

Q. Is there any way you could weigh the trucks empty and then weigh them loaded?

A. We do it at the mines at all times, every load.

Q. I mean here in Chicago, without advancing the price of the coal.

A. No, sir. In some cases, in a few instances they might, but in the majority of them you might say it would be impossible.

We have had no complaints from our customers as to short weight.

Cross-examination.

By Mr. Lefkovits:

We do not have any office in Chicago. I know Mr. Burgess. Mr. Burgess has an office here. He does business under only one trade name, Northern Coal Company, and he has a trade name on his coal, which he calls Tropic-Air coal. The previous witness was in error. He got the trade name mixed up with his company.

Under that trade name Mr. Burgess advertises here in Chicago for the sale of that coal and he procures some of these potential customers and he sends the orders down to us at the mine.

We fulfill the order as sent to us by Mr. Burgess. I don't know whether you would call Mr. Burgess our customer or not. He is a kind of a jobber for us, yes. The names [fol. 30] of the people he sends in are right on the ticket. We do not know anything about the customers he sends in.

Sure we are concerned about the customer. We are not concerned so far as their credit rating is concerned; we get our money anyway. It is cash. We don't get the cash from Mr. Burgess. The truck driver gets it from the customer. He gives it to us or to Mr. Burgess, according to which is handier. In some cases he gives it to Mr. Burgess and Mr. Burgess gives it to us. In other cases he gives it right direct to us. Supposing a payment is made direct to us by the trucker, we make a remittance to Mr. Burgess. He gets a jobber's price.

Examining the delivery ticket (City's Exhibit 1) in this particular case, the delivery was not made to Mr. Burgess. It was made on Mr. Burgess' order. We billed Mr. Burgess for that. We charged this to Mr. Burgess, evidently. The customer paid for it. In this particular instance Mr. Burgess was not our customer; he was our jobber in the deal.

The Court: Oh, what is the difference? Of course he is the jobber. That is perfectly apparent.

(Witness excused.)

(After an argument in chambers, the following proceedings were had in open court:)

The Court: The only question is the amount of the fine.
Mr. McConnell: We want to make an offer for the record.
The Court: What is the offer?
Mr. McConnell: Mr. Rall will make it.

[fol. 31] MOTION FOR PROPOSITION OF LAW

Mr. Rall: In each of the cases the respective defendants ask the Court to hold the following to be the law of the case:

The burden of proof is on the plaintiff, City of Chicago, to show that the sale of the coal involved in the proceedings to the person or persons to whom delivery of the same was being made, took place within the corporate limits of the City of Chicago, and if the Court finds from the evidence that the said sale of said coal took place outside of the corporate limits of the City of Chicago, then the finding of the Court should be for the defendant.

We ask the Court to hold that proposition in each of the cases.

The Court: The Court holds that the sales are made in the City of Chicago.

The Court: The Court will hold that your objection is sustained, if you want it written out.

Mr. Rall: All right. For the purpose of the record then, we may submit these propositions of law tomorrow.

The Court: I will wait until the morning.

Mr. Rall: It is further the contention that if construed to prevent the acts here involved, the ordinance on weights and measures, the violation of which is charged, is a violation of Article II, Section 2, relating in due process of law, of the Illinois State Constitution, and Section 1 of the Fourteenth Amendment to the Constitution of the United States and that said ordinance so construed goes beyond the enabling act under which the city was authorized to pass an ordinance dealing with weights and measures.

[fol. 32] The Court: All right, come in at ten o'clock.

(Whereupon an adjournment was taken until 10:00 o'clock A. M. of the following day.)

(The court met pursuant to adjournment with the same attorneys present as before.)

COLLOQUY

The Court: Did you want to make any remarks before I enter the order?

Mr. Lefkovits: In regard to these cases?

The Court: Yes.

Mr. Lefkovits: I do, if I may. The ordinance provides for a minimum fine of $25 and a maximum fine of $200 on this particular charge. Now, the City is making a very earnest attempt at this time to rid itself of a very troublesome proposition. Because of its being the law, it is necessary that they have a public weighmaster's certificate. That is the only way we can protect the public from being bilked. We can only look to some reliable individual who is bonded to protect the user of coal in Chicago.

We have tried other cases against mining companies and truckers. Counsel has appeared for them in other cases.

He knows our situation, and he knows what happened in those other cases. This is important because these truckers are not giving us this litigation; it is the mining company which is giving us this litigation. They know they are violating the law, because they are going in the Superior Court and asking for an injunction, and making jury demands and coming in here on changes of venue.

I feel, although we do not want the maximum fine in these cases, that there ought to be a fine which will emphasize the [fol. 33] fact that we mean to enforce the ordinance and rid ourselves of this troublesome proposition. I want to be as lenient as I can. Eventually the mining company will pay for it; it is not the trucker who will pay. It is recommended from the department for me to be as lenient as I can. There certainly ought to be a fine of $50 in each one of these cases. I think that is eminently fair.

Mr. McConnell: If the Court please, the gentlemen who are tried here are truckers receiving coal which has been weighed over state scales. There is no question here of there being short weights. In fact, they are overweight. The testimony in one case was he was 400 pounds overweight.

The Court: Four hundred and fifty.

Mr. McConnell: Four hundred and fifty pounds overweight. As to counsel's remarks about the coal company, while they are irrelevant, I want to say this: that this company is a legitimate company, which is engaged in a fight for its existence here, and it has a perfect right under the Constitution to raise the questions which have been raised. These defendants have a perfect right to protect their legal rights in court and have their day in court; and certainly litigants should not be penalized in any way for taking the rights which the law allows. Now, there is no malice, and there is no question of defrauding anybody here. It is a technical violation of this Act. The cases will be tested out, as it seems to me that we have a right to make the test in these individual cases, and I do not see why anything more than the minimum fine should be assessed against these defendants.

The Court: In the case of Hauge, it will be $75; in the others it will be $25.

[fol. 34] Mr. Rall: Will your Honor fix the amount of the appeal bond?

The Court: All right. Bond within five days. In the meantime you can serve notice of appeal and file your bond. I will fix the bond. I will stay the execution until Tuesday. That merely gives you an opportunity to appeal.

Make the bond $200 in each case; $200 ought to be sufficient.

Mr. Lefkovits: $200 is sufficient.

Mr. Rall: Will your Honor certify that there is a municipal ordinance involved and it requires an appeal to the Supreme Court? It is our contention that an ordinance requiring delivery alone in this city and incurring the penalties of tnis court is invalid, because it therefore violates the Constitution; also because it is beyond the power of the city.

Mr. Lefkovits: It is my understanding that his Honor is not ruling on that particular set of facts; his Honor is ruling on the fact that there was a consummation of sale in the City of Chicago.

Mr. Rall: That is the purpose, to get the Court's opinion of the law.

The Court: I do not think the Supreme Court will do any different if they agree the sale was made in the City of Chicago. It will not consider a hypothetical question. If the evidence showed that the sales were made outside of the city then that would raise that question which you have raised. Now, Mr. McElvain got on the stand and said that this man Burgess was a broker; he said he was a jobber, broker; "jobber" was the term he used; was here in Chicago——

Mr. Lefkovits: Had his offices here.

[fol. 35] The Court: And they got their orders from Burgess; that is true of all of them here. The testimony could have shown the sales were made down there, but there is no indication that anybody that bought coal here knew anything about that situation down there. I do not see how I can certify something which does no appear in the evidence.

Mr. McConnell: If the Court please, that is the question.

The Court: You remember I interrupted you during one of the cases yesterday, and said you were shadow boxing over something when the evidence seemed to show the sales were made here.

Mr. McConnell: I remember that. Here is the point: We haven't argued this before your Honor, but it appeared here in the evidence that the trucking charge was paid by the customer and that delivery tickets were made in the name of the purchaser down at Morris. Now, the Uniform Sales Act provides that where the goods are appropriated the title passes. That is the first time the coal could have been appropriated; there couldn't have been a sale here, whether by Burgess or anyone else, in Chicago. Why? Because there are no goods here in Chicago for anybody to appropriate; the goods were appropriated in Morris when they were placed in the truck of the trucker. It has been our contention when those goods have been appropriated in that manner, title passes to the buyer, he paid the charges, and the sale was consummated in Morris.

The Court: There is nothing indicating there was any privity of contact between the coal company and the customer; the coal company merely delivered coal to the truck [fol. 36] driver on somebody else's order. They looked to Burgess or the driver for their money. Nobody else had anything to do with it. They had no account with any customer.

Mr. Lefkovits: As a matter of fact, most of these were on the order of Burgess; and there is not a scintilla of evidence to show where any purchaser said they dealt with the mine; not one witness testified to that effect.

The Court: There should have been evidence here to show that is so; that the sales were made outside of the city:

Mr. Lefkovits: That is true; that would have raised another question.

Mr. McConnell: Suppose the Appellate Court finds on these facts that there was a sale in Morris, what then?

The Court: There is nothing we can do about that.

Mr. McConnell: Then we have a further question, your Honor, as to the validity of the ordinance and the constitutionality of the ordinance; which really should be passed upon by the Supreme Court.

* * * * * * *

Mr. Lefkovits: The constitutionality of this has been passed on; they know it is constitutional.

The Court: It was passed on in the 312th Illinois.

Mr. Rall: The big reason they say it was constitutional was the fact that they permitted the dealer of coal himself to be a public weighmaster. Now, if the City permitted us to be a public weighmaster, as we had been before, then, of course, there will be no complaint.

[fol. 37] The Court: I see your point. The difficulty is, that that cannot be reached in this case because the coal company is not a party in any sense in this case.

Mr. Rall: That is true, but when the coal company goes over into the Superior Court, counsel comes back here and offers that as some reason for punishing somebody else here.

The Court: I do not think that is so. It did not influence me any.

Mr. Rall: It did not influence your Honor, I can see that.

Mr. McConnell: May I say this, if the Court please? This question of the constitutionality of this ordinance is directly challenged here. That is, we do here challenge the constitutionality of that ordinance. Of course, if the ordinance is not constitutional, this proceeding must fail.

The Court: Get me the 312th again. Let's look at it and see.

Mr. McConnell: My point is this, if the Court please: Whenever these questions of constitutionality come before the Supreme Court, or an ordinance comes before the Court, the Court looks at the ordinance to see if it is a reasonable restriction.

The Court: Wait, I will look this over and see. This feature of it, however, has been passed on. Now, the question of whether or not the sale was made outside of the City of Chicago has not been passed with relation to the ordinance.

Mr. McConnell: No, at no time.

Mr. Rall: Apparently it has never been passed on.

[fol. 38] The Court: Never been passed on?

Mr. Rall: No, there has been no decision on the question which we are raising, and raise here, whether or not the City of Chicago has a right to stop a man at the city limits and see if you have a certificate of public weighmaster, even though he has a certificate from scales inspected under the state law.

Mr. Lefkovits: That is not so here.

The Court: There is no evidence that that is true; there is no evidence in the record that the scales on which this coal was weighed complied with the state law.

Mr. McConnell: Oh, yes.

Mr. Lefkovits: No.

The Court: Where is that evidence in the record?

Mr. McConnell: Yes, that is in the record. McElvain testified that the scales were inspected, had been inspected this year, and certified by the inspector of public weights and standards, State of Illinois.

The Court: Yes, I guess that is right.

Mr. McConnell: Over which this coal is weighed. That testimony is in each of these cases by stipulation.

* * * * * * *

Mr. McConnell: Now, in view of that fact, and the state statute authorizes it, where the delivery tickets shall be available to the state inspector, and this is a state-inspected scale, we have the question here as to whether or not this ordinance is constitutional.

[fol. 39] Mr. Lefkovits: But the state law also delegates to cities the right to inspect this coal.

The Court: I will tell you what you may do if you want; you may write up that statement. You do that and I will consider it.

* * * * * * *

The Court: Let me see that 312th. What is that case?

Mr. Rall: Wisconsin Lime and Cement.

Mr. McConnell: The Supreme Court cannot anticipate every point that may be raised; they may change their mind on a different point.

Mr. Lefkovits: It covers that whole point, the reasonableness of the act.

Mr. McConnell: On a different set of facts it makes a difference. They had a coal yard here; they didn't have a state weighmaster's certificate in that case.

At the request of the defendant, the trial Judge signed and ordered filed in this cause the following certificate:

(The report of proceedings here contains the certificate printed above, Rec. p. 13, which is therefore not repeated here.)

The defendant, at the commencement of the further hearing on March 20, 1935, and before the entry of Judgment herein submitted a written proposition of law to the Court and asked the Court to mark it "Held", but the Court refused to do so and instead marked it "Refused".

Said proposition of law was and is as follows:

(The report of proceedings here contains the proposition of law, marked "Refused, F. M. Padden, Judge," printed above, Rec. p. 15, which is therefore not repeated here.)

[fol. 40] Whereupon, the Court, over the objection of the defendant, entered a judgment in favor of the plaintiff, City of Chicago, and against the said defendant, as shown by the record in this cause.

Forasmuch as the above matters and things do not fully appear of record, the defendant tenders this report of proceedings in said cause and prays that it may be signed and sealed by the Judge of said court and filed among the records in this cause.

Accordingly, I hereby certify that the above is a full, true and complete stenographic report of all of the evidence, oral and documentary, offered or received in the above entitled cause and of the proceedings had and rulings made in said cause.

Without prejudice to the right of either party hereto to ask the Supreme Court of Illinois to take judicial notice of the ordinances of the City of Chicago pursuant to "An Act in relation to judicial notice," in force July 1, 1929, as amended, the undersigned hereby certifies that on the trial of the above entitled cause the Municipal Court of Chicago took judicial notice of the due passage and publication of the following ordinances of the City of Chicago relating to the Department of Weights and Measures, to weights and measures, to dealers in coal, etc., and to public weighmasters, the sections being those of the Revised Chicago Code of 1931:

ORDINANCES OF CITY OF CHICAGO

Department of Weights and Measures

525. Department created.) There is hereby created and established an executive branch of the city government to

be known as the department of weights and measures, having jurisdiction over the inspection and examination of all [fol. 41] weights, measures, scale beams, patent balances, steelyards and other instruments used for weighing and measuring in the city.

526. Inspector of weights and measures—appointment.) There is hereby created the office of inspector of weights and measures; the said inspector shall be the head of the department of weights and measures, and shall have supervision over it. He shall be appointed by the mayor, by and with the advice and consent of the city council.

Weights and Measures

2939. Weight to be verified on demand of purchaser.) Whenever the purchaser or intending purchaser, or the inspector of weights and measures or any of his deputies, shall make demand that the weight of the load of such crushed stone, bank sand, torpedo sand or gravel be verified, it shall thereupon become the duty of the person, firm or corporation delivering such material to convey the same to some public scale selected by the inspector of weights and measures of the city of Chicago or any of his deputies, or the purchaser or intending purchaser of the material being delivered, in the particular locality where the material is to be delivered, or to any private scale in the particular locality where the owner thereof shall consent to such use, and permit the weighing of the material together with the equipment, for the purpose of ascertaining the gross weight thereof, and shall, after the delivery of such material, return forthwith with the conveyance and equipment used in the delivery of such material to the same scale and permit the weighing of said conveyance and equipment for the purpose of verifying the net weight of the material, as shown by the said memorandum; provided, however, that if such person, firm or corporation so delivering the said [fol. 42] material requests the privilege of reweighing said material on another and different scale than that selected by the inspector of weights and measures of the city of Chicago or any of his deputies, or the purchaser or intending purchaser, said inspector of weights and measures or his deputy, or the purchaser or intending purchaser to whom delivery is to be made, shall permit such weighing on some other scale in the particular locality.

Regulations as to Weights and Measures

2947. Commodities sold in load lots.) Every load of any commodity, produce or other article or articles of merchandise sold in load lots by weight, delivered by wagon, truck or other vehicle within the city, shall be weighed by a public weighmaster; a certificate of weight for each such load, issued by such public weighmaster, shall be delivered by the driver or person in charge of the wagon, truck, or other vehicle used in the delivery, to the purchaser or consignee of such load, or to his or their agent at the time of the delivery and before any of the commodity, produce or other article or articles of merchandise is removed from the vehicle, or such certificates shall be delivered to the inspector of weights and measures, or any of his deputies upon his or their demand. When delivery is made, in case no person is present to receive such commodity, produce or other article or articles of merchandise, and if the purchaser or consignee, or his or their agent, cannot be located, then the memorandum or certificate of weight hereinbefore provided for shall be posted conspicuously at the place of delivery before any of the commodity, produce or other article or articles of merchandise is removed from the vehicle.

2950. Conditions of re-weighing where weighmaster weighs own commodities.) In any case where a person, [fol. 43] firm or corporation as a public weighmaster has weighed any load lot of any commodity, produce, article or articles of merchandise sold in load lots by weight which was sold or delivered by such person, firm or corporation or by any person directly or indirectly interested with such person, firm or corporation in the operation of its public scale, it shall be the duty of such person, firm or corporation delivering such load and of the driver or person in charge of the vehicle used in the delivery thereof, upon the request of the inspector of weights and measures or of any of his deputies or the consignee or purchaser, to convey such load to some scale selected by the inspector of weights and measures or such deputy or such consignee or purchaser and permit the weighing of the gross weight of such load, and, after the delivery of such load, to return forthwith with the vehicle and equipment used in the delivery thereof to the same scale and permit the ascertaining of the tare weight for the purpose of verifying the net weight of such

load as shown by the weight certificate, but only on the following conditions:

1. That the scale thus selected shall be some public or private scale which has been duly inspected and sealed by the inspector of weights and measures in the particular locality where the delivery is to be made, or the demand for reweighing is made, and in no case farther than one mile therefrom unless there is no adequate scale available for the purpose within one mile.

2. That if such person, firm or corporation delivering such load or such driver or other person in charge of the vehicle used in the delivery thereof so demands, such load, in addition to being weighed on the scale thus selected as aforesaid, shall be weighed on the scale of the public weighmaster where it was originally weighed, or on any scale, [fol. 44] public or private, which has been duly inspected and sealed by the inspector of weights and measures other than that so selected, in the particular locality where the request is to be made and in no case farther than one mile therefrom.

2951. Conditions for re-weighing of commodities not owned by the weighmaster.) In any case where the person, firm or corporation selling or delivering any load lot of any commodity, produce, article or articles of merchandise sold in load lots by weight has not as a public weighmaster weighed such load lot, and has caused such load lot to be weighed by another person, firm or corporation licensed as a public weighmaster, and is not interested directly or indirectly with such public weighmaster in the operation of such public weighmaster's scale or scales, it shall be the duty of the person, firm or corporation delivering such load and of the driver or person in charge of the vehicle used in the delivery thereof, upon the request of the purchaser or consignee, or the inspector of weights and measures or of any of his deputies, to convey such load to some scale selected by such purchaser or consignee, or by the inspector of weights and measures or such deputy, and permit the weighing of the gross weight of such load, and after the delivery of such load, to return forthwith with the vehicle and equipment used in the delivery thereof to the same scale and permit the ascertaining of the tare weight for the purpose of verifying the net weight of such

load as shown by the weight certificate but only on the following conditions:

1. That the inspector of weights and measures or the deputy, or purchaser, or consignee making such request shall have followed such load or shall have kept it in view from the location of the scale where such load was originally weighed by the public weighmaster to the point where such request is made.

[fol. 45] 2. That the scale thus selected shall be some public or private scale which has been duly inspected and sealed by the inspector of weights and measures, and shall be located in the vicinity of the point where such request is made and in no case farther than one mile therefrom unless there is no adequate scale available for the purpose within one mile.

3. That if such person, firm or corporation delivering such load, or such driver or other person in charge of the vehicle used in the delivery thereof, so demands, such load, in lieu of being weighed on the scale thus selected as aforesaid, shall be weighed on the scale of the public weighmaster where it was originally weighed or on any scale, public or private, which has been duly inspected and sealed by the inspector of weights and measures, other than that so selected, located in the vicinity of the point where such request is made and in no case farther than one mile therefrom.

2953. Fine for delivery of false weight certificates, etc.) Any person, firm or corporation selling and delivering or attempting to deliver any load lot of any commodity, produce or other article or articles of merchandise sold in load lot by weight, delivered by wagon, truck or other vehicle within the city, of a quantity less than that called for by the delivery ticket, or any public weighmaster or deputy who shall provide the driver or person in charge of the vehicle used in the delivery thereof, or the person making or attempting to make delivery thereof, with a certificate, memorandum or weight ticket which does not correctly state the information required to be given by virtue of section 3623, or with a certificate or memorandum which does not give the result of the actual weighing of such load lot, and any driver or person in charge of such delivery

who shall fail, neglect or refuse to deliver to the inspector [fol. 46] of weights and measures or any of his deputies upon demand, the aforesaid public weighmaster's certificate before such load or any part thereof is removed from the vehicle, or who shall refuse to comply with their or his request to reweigh the same in order that the weights stated in such certificate may be verified, shall be fined not less than seventy-five dollars nor more than two hundred dollars for each such offense; the penalty provided in this section shall be in addition to any penalty that may be imposed under sections 3615 or 3616. Provided, that whenever the re-weighing is done on a scale other than the scale on which the weighing was originally done a variance of one per cent or less in the net weight of a load lot between the net weight as set forth in the public weighmaster's certificate and the net weight as ascertained by re-weighing such load shall not be considered a violation of this ordinance.

2954. Meaning of "net weight.") When any commodity, produce, article or articles is or are sold subject to public weighmaster's weights, the net weight shown in the weight certificate issued by such public weighmaster shall be taken to be the true net weight of the same, subject to the right of re-weighing as herein provided. Net weight, within the meaning of this article, shall be the actual weight of the commodity, produce, article or articles excluding the weight of the vehicle, if any, in which it is loaded, and excluding the weight of the horses and driver of such vehicle or either of them, as the case may be, if such horses and driver, or either of them, be weighed as part of the tare weight.

"2955. Weighmaster can weigh own commodities.) Nothing contained in this article shall be construed to prevent any person, firm or corporation engaged in the business of selling any commodity, produce or article of mer- [fol. 47] chandise which is ordinarily delivered by wagon, truck or other vehicle, from becoming public weighmaster and appointing deputy weighmasters to weigh the commodity, produce or article of merchandise being sold and delivered by such person, firm or corporation; and any weight certificate issued by such person, firm or corporation, or the deputies appointed by same, covering commodities sold by such person, firm or corporation, shall be

of the same effect as the weight certificate issued by any other public weighmaster.

2956. Ice excluded.) Ice sold in load lots by weight is exempted from all the provisions in this article.

2957. Penalty. Any person, firm or corporation, including any weighmaster or deputy weighmaster, that shall violate any of the provisions of this article, shall, when no other specific penalty is herein provided, be fined not less than five dollars nor more than two hundred dollars for each offense. The inspector of weights and measures shall enforce the provisions of this article.

Coal, Charcoal and Coke

3341. Definitions.) Whenever used in this article:

(a) the words "solid fuel" shall mean any anthracite, semi-anthracite, bituminous, semi-bituminous or lignite coal, briquettes, boulets, coke, gashouse coke, petroleum coke, petroleum carbon, or any other manufactured or patented fuel not sold by liquid or metered measure;

(b) the words "hundred weight" shall mean one hundred pounds avoirdupois and

(c) the word "ton" shall mean twenty hundred weight. (As amended May 18, 1934.)

3342. Delivery ticket—requirements—verifying weight.) [fol. 48] Any person, firm or corporation engaged in the business of selling, or selling and delivering, of solid fuel in the city shall provide the driver of the wagon, truck, or other conveyance with a separate delivery ticket for each kind, grade and size of solid fuel contained on the wagon, truck, or other conveyance bearing the name of the person, firm or corporation selling such solid fuel, showing the gross weight, the tare and the net weight of each kind, grade or size of solid fuel, and the name and address of the purchaser of said solid fuel, or the person, firm or corporation to whom same is to be delivered, which said delivery ticket or tickets shall be delivered by the driver in charge of the wagon, truck, or other conveyance to each purchaser, or his agent or representative, or to the person to whom delivery is to be made, at the time of the delivery of the

fuel and before such fuel or any part thereof is removed from such wagon, truck, or other conveyance. In the event that solid fuel is sold or offered for sale by a peddler, or by a dealer making sale or delivery in any other manner than by wagon, truck, or other conveyance, such peddler or dealer, shall deliver to the purchaser or intending purchaser, or his agent or representative, or the person to whom delivery is to be made, before the delivery of such fuel or any part thereof, or to the inspector of weights and measures of the city of Chicago upon his demand, a delivery ticket or tickets bearing the name of such peddler or dealer, his license number if a peddler or name and address if a dealer, and showing the net weight, and the kind, grade, and size of the fuel sold or offered for sale.

Every such person, firm or corporation shall, on demand of the inspector of weights and measures of the city of Chicago, or any of his deputies, or the purchaser or intending purchaser or his agent or representative, or the person to whom the delivery is to be made, produce and [fol. 49] deliver said ticket or tickets to said officer or to his deputies, or to the purchaser or intending purchaser, or his agent or representative, or to the person to whom delivery is to be made, and whenever said officer or any of his deputies, or the purchaser or intending purchaser, or his agent or representative, or the person to whom delivery is to be made, shall demand that the said weights shown by said ticket or tickets be verified, it shall thereupon become the duty of the person, firm or corporation delivering such fuel to convey the same forthwith to some public scale selected by the inspector of weights and measures of the city of Chicago, or any of his deputies, or the purchaser or intending purchaser of the fuel being delivered, or his agent or representative, or the person to whom delivery is to be made, in the particular locality where the solid fuel is to be delivered, or to any private scale if the particular locality where the owner thereof shall consent to such use, and permit the weighing of the solid fuel, together with conveyance and equipment, for the purpose of ascertaining the gross weight thereof, and shall, after the delivery of such fuel, return forthwith with the conveyance and equipment used in the delivery of such solid fuel to the same scale and permit the weighing of said conveyance and equipment for the purpose of verify-

ing the net weight of the solid fuel, as shown by the said ticket or tickets; provided, however, that if such person, firm or corporation requests the privilege of re-weighing said solid fuel conveyance and equipment on another and different scale from that selected by the inspector of weights and measures of the city of Chicago, or any of his deputies, or the purchaser or intending purchaser or his agent, or representative, or the person to whom delivery is to be made, said inspector of weights and measures or his deputy, or the purchaser or intending purchaser or his [fol. 50] agent or representative, or the person to whom the delivery is to be made, shall consent to such weighing on some other scale in the particular locality.

Every person, firm or corporation selling or offering for sale solid fuel in the city shall sell the same by avoirdupois weight, except where otherwise provided by contract. (As amended May 18, 1934.)

3343. Penalty.) Any person, firm or corporation selling and delivering or attempting to deliver solid fuel within the city of Chicago who shall provide the driver or person in charge of the wagon, truck, or other conveyance used in the carrying thereof, or the person making or attempting to make the delivery thereof, with a ticket or tickets or memorandum which does not correctly give the information required to be given by virtue of Section 3342, or with a ticket or tickets or memorandum which does not give the result of the actual weighing of such solid fuel, and any such driver and any such persons making or atempting to make delivery of any solid fuel, who shall produce, deliver, offer or tender any ticket or tickets or memorandum which does not correctly give the information aforesaid, or does not give the result of the actual weighing of such solid fuel, shall be fined not less than fifty dollars nor more than two hundred dollars for each offense.

Any person, firm or corporation delivering or attempting to deliver solid fuel within the city of Chicago of a quantity less than that called for by the delivery ticket or tickets, as provided for in Section 3342, shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense.

Any person, firm or corporation selling and delivering or attempting to deliver solid fuel within the city of Chi- [fol. 51] cago who shall fail to deliver by the person in

charge of the wagon, truck or other conveyance used in the carrying thereof the ticket or tickets or memorandum giving the information required to be given by virtue of Section 3342, and any such driver and any such persons, making or attempting to make delivery of any solid fuel who shall fail, neglect or refuse to deliver to the purchaser or intending purchaser, or his agent or representative, or to the person to whom delivery is to be made, or to the inspector of weights and measures of the city of Chicago or one of his deputies, the ticket or tickets or memorandum as aforesaid, before such solid fuel or any part thereof is removed from the wagon, truck or other conveyance, shall be fined not less than ten dollars nor more than fifty dollars for each offense; and any person, firm or corporation violating any of the provisions of Section 3342, or who shall fail, refuse or neglect to comply with any of the provisions thereof, for which no specific penalty is herein provided, shall be fined not less than ten dollars nor more than fifty dollars for each offense. (As amended May 18, 1934.)

3344. Mixing coal prohibited.) * * * If two or more different kinds, grades or sizes of solid fuel are loaded on the same wagon, truck or other conveyance, each kind, grade and size of solid fuel shall be weighed and loaded separately, and shall be placed in bags, separated by partitions, or placed in closed containers, which closed containers shall have legibly stamped upon their sides the actual net weight and the kind, grade and size of each type of solid fuel contained therein; such loading shall be in a manner sufficient that any time during the selling or delivering of such solid fuel, each kind, grade and size of solid fuel may be weighed separately; and the said person, firm or corporation selling or delivering said solid fuel shall provide the driver of the wagon, truck or other conveyance in which the same is transported, with a delivery [fol. 52] ticket or tickets made out in conformity with the provisions of Section 3342 and shall also show on all invoices, bills and statements rendered the purchaser, the weight of each separate kind, grade or size of solid fuel so delivered.

Any person, firm or corporation violating or failing to comply with any of the provisions of this section shall be fined not less than twenty-five dollars and not more than

one hundred dollars for each offense. (As amended May 18, 1934.)

Hay, Straw, Grain and Mill-Feed

3445. Weighing—reweighing.) Any person in charge of a wagon, or other conveyance used for delivering any such straw, hay, grain or mill-feed within the city of Chicago shall, at the request of the inspector of weights and measures or any of his deputies, or at the request of the purchaser or intending purchaser of any such hay, straw, grain or mill-feed, at any time after the weighing thereof, produce and deliver said memorandum for the inspection of such inspector of weights and measures, his deputy or the purchaser or intending purchaser, and shall upon request of the inspector of weights and measures, his deputy or the purchaser or intending purchaser, go to a scale which has been duly inspected and sealed by the inspector of weights and measures and which is located in the particular locality where the delivery is to be made, and which shall be designated by said inspector of weights and measures, his deputy or the purchaser or intending purchaser, and there weigh such hay, straw, grain or mill-feed about to be delivered, together with the wagon or other conveyance (in case such hay, straw, grain or mill-feed is delivered in wagon-load lots) used for the delivery of the same for the purpose of ascertaining the gross weight thereof, and [fol. 53] shall, after the delivery of such hay, straw, grain or mill-feed return forthwith, with the wagon, or other conveyance (in case such hay, straw, grain or mill-feed is delivered in wagon-load lots) and there weigh such wagon or other conveyance for the purpose of verifying the net weight of such hay, straw, grain or mill-feed as shown by said memorandum; provided, however, that if the seller of such hay, straw, grain or mill-feed, or the driver of the wagon, or the person in charge of any other conveyance, or the person making the delivery, requests the privilege of reweighing such hay, straw, grain or mill-feed on another and different scale from that selected by the inspector of weights and measures or by his deputy, or by the purchaser or intending purchaser, said inspector of weights and measures or his deputy, or the purchaser or intending purchaser, shall consent to such reweighing on some other

scale in the particular locality where such delivery is to be made.

Public Weighmasters.

3612. Appointment.) Any person, firm or corporation owning a scale or scales suitable for weighing any commodity, produce or articles of merchandise in load lots, when contained in any wagon, auto truck or other vehicle, or in any quantity less than load lots when not contained in any wagon, truck or other vehicle, shall be eligible for appointment as a public weighmaster in the city of Chicago upon complying with the provisions of this chapter.

3613. Application.) Any person, firm or corporation owning a scale or scales suitable for weighing as aforesaid desiring to be licensed as a public weighmaster, shall file an application in writing therefor which shall conform to the general requirements of this ordinance relating to applica- [fol. 54] tions for licenses, and shall set forth the location of the place of business for which such license is requested. Such application shall contain, plainly printed thereon, the following form of agreement, which shall be subscribed by the applicant before any license shall be issued thereunder:

"The applicant hereby agrees and consents, as a condition for the issuance of a license hereunder, that in case the applicant as a public weighmaster weighs any load lot of any commodity, produce, article or articles of merchandise sold in load lots by weight, sold or delivered by the applicant or any person directly or indirectly interested with the applicant in the operation of the public scale of the applicant, the inspector of weights and measures of the city of Chicago, or any of his deputies acting under his orders, or the purchaser or consignee, shall have the right to reweigh or cause to be reweighed, as provided in section 2950 of this ordinance, any such load lot of commodity, produce, article or articles of merchandise. This condition is accepted by the applicant with the understanding that the same shall, upon the issuance of a license hereunder, at once become binding on him."

3614. Bond—fee.) Such applicant shall also execute and present with his application a bond in favor of the city of Chicago in the sum of two thousand dollars, with such sureties as may be approved by the comptroller, condi-

tioned for the faithful performance of such applicant's duties as a public weighmaster and for the payment by such public weighmaster of any fine or fines which may be imposed upon him, them or it for any violation of said applicant's duties as such public weighmaster. Upon compliance with the conditions above stated and upon payment to the city collector of the sum of twenty dollars as an annual license fee, the mayor may issue a license authorizing [fol. 55] such applicant to act as a public weighmaster.

3615. Conditions binding on licensee.) The license so issued shall contain apt words indicating that the same is issued and accepted subject to the conditions and agreements set forth in section 3613 and contained in the application for same and subscribed by the licensee when application for such license is made; and the said conditions shall upon the issuance of said license at once become binding on the licensee, his agents and employes, who shall conform to the requirements of same. Any person or corporation who fails to comply with or violates any of the provisions of this section, or, having received a license under the terms and conditions imposed by this section, fails to observe the conditions so imposed, shall be liable, in addition to any other penalty prescribed by law, to a penalty of fifty dollars for each offense.

3617. Scale—how provided.) Each public weighmaster licensed under the provisions of this chapter shall provide his own scales, which shall be of a kind or pattern approved by the inspector of weights and measures, and each such public weighmaster shall keep his said scales properly adjusted and repaired at his own expense. It shall be the duty of each public weighmaster to have such scales inspected by the inspector of weights and measures at least once exery six months, and oftener if required.

3619. Shall weigh all commodities tendered for weighing.) Public weighmasters owning scales suitable for weighing commodities loaded in wagons, trucks or other vehicles, shall weigh any commodity, produce or articles of merchandise loaded in any wagon, truck or other vehicle when requested so to do by the person bringing the same to the scale of such weighmaster; public weighmasters owning scales suitable for weighing commodities in amounts [fol. 56] or quantities less than load lotes when not con-

tained in any wagon, truck or other vehicle, shall weigh any such commodity when requested so to do by any person bringing the same to the scale of such weighmaster.

3621. Charges for weighing.) Public weighmasters, when not the owners or sellers of the articles, commodities or produce weighed by them, shall be entitled to charge and receive a sum not in excess of twenty-five cents for each and every load or part of load (or lesser quantity when not contained in any wagon, truck or other vehicle), of any commodity, produce, article or articles of merchandise weighed by them over the scales of such public weighmasters.

3622. Seal.) Each public and deputy weighmaster shall procure a seal, at his own expense, which seal shall be round in form not to exceed one and one-quarter inches in diameter, of a type similar to a notary public's seal. The seal of a public weighmaster shall show his name around the upper half of the dies and his title around the lower half of the dies. The seal of a deputy public weighmaster shall have the name of the weighmaster who appointed him around the upper half of the dies, with his own name across the center of the dies and his title around the lower half of the dies. Such seal shall be stamped over the weights set forth therein upon each certificate issued by such public or deputy weighmaster. No deputy weighmaster shall use his seal on any weight certificate other than the one of the public weighmaster by whom he has been appointed, nor shall he be authorized to weigh or issue certificates for any weighing done on any scale other than those the locations of which appear on the license application of the public weighmaster appointing him or such additional ones as may be installed after the application has been made, as provided for in section 3618; provided, however, that in case of an emergency caused by the breaking down or [fol. 57] getting out of order of the scale of the public weighmaster, he shall, pending the repairing and resealing of such scale, be authorized to weigh on another different scale upon the public weighmaster appointing him assuming responsibility for the accuracy of the scale so used.

3623. Weight certificates.) Each public weighmaster shall issue a weight certificate, signed by him or his deputy, under his official seal, which certificate shall state thereon

the following: The commodity, produce, article or articles weighed; the date; the name of the weighmaster or deputy weighmaster who did the weighing; the name and address of the person, firm or corporation for whom the weighing was done; the name of the driver of the vehicle bringing such commodity, produce, article or articles to the scales, or, if the same is not contained in a vehicle, the name and address of the person bringing the same to the scales; where contained in a vehicle, the kind of vehicle and the name and address of the purchaser or consignee of the commodity weighed; when the commodity is loaded in a vehicle, the total or gross weight of the commodity weighed and the conveyance in which it is loaded, together with the driver and any other person who may be on the vehicle when weighed, and of the horses, if a horse-drawn vehicle and the horses are weighed; the tare weight or the weight of the vehicle, including driver and any other person who may have been on the vehicle when weighed while loading and including the horses if they were weighed when the loaded vehicle was weighed; the net weight of the commodity, produce, article or articles contained in such vehicle, or the net weight of the commodity, produce, article or articles when not contained in a vehicle at the time of weighing. In no case shall any public weighmaster state in his certificate the tare weight of any vehicle until after he shall have weighed [fol. 58] the vehicle in such manner as to secure the weight as specified herein; provided, however, that in the case of a divided load, by which is meant a load containing more than one order for the same or different purchasers or consignees, no penalty shall be imposed under this chapter by reason of the fact that the tare weight shown on the weight certificates is only the original tare weight of the vehicle and equipment before loading if in such case each order has been weighed separately and the net weight of each separate order or delivery is correctly shown on the weight certificate and such correct net weight is delivered.

3626. Penalty for issuing certificate giving false weight.) Any public weighmaster or any deputy public weighmaster who shall issue a certificate of weight giving a false weight of any article or commodity weighed by him, to any person, firm or corporation, shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense; and upon conviction hereunder, the mayor, in his discretion,

may cancel the license of such weighmaster or deputy weighmaster, and may thereafter, in his discretion, refuse to issue a license to such weighmaster or deputy weighmaster in the same or succeeding year. Any fine imposed against such public weighmaster or deputy weighmaster may be enforced against his surety under the bond furnished by such weighmaster or deputy weighmaster.

Witness my hand and seal this 8th day of July, A. D. 1935.

(Signed) Frank M. Padden, Judge of the Municipal Court of Chicago. (Seal.)

[fol. 59] Presented to me in open court this 8th day of July, A. D. 1935, in absence of trial judge from jurisdiction.

(Signed) John J. Sonsteby, Chief Justice.

Approved as to form. (Signed) Martin H. Foss, Assistant Corporation Counsel, Attorney for City of Chicago, Plaintiff.

(Stamped:) "Filed The Municipal Court of Chicago, Jul. 8, 1935. Joseph L. Gill, Clerk."

STIPULATION TO USE ORIGINAL REPORT OF PROCEEDINGS

The plaintiff, City of Chicago, and the said defendant, by their respective attorneys, hereby stipulate that the above original report of proceedings may in lieu of a copy be inserted by the Clerk of this Court in the transcript of the record of this cause for all purposes of review hereof.

City of Chicago, Plaintiff, by William H. Sexton, Corporation Counsel, Martin H. Foss, Assistant Corporation Counsel, Its Attorneys. Marcus Hauge, Defendant, by Thomas C. McConnell, His Attorney.

[fols. 60 & 61] CERTIFICATE OF CLERK OF TRIAL COURT TO TRANSCRIPT OF RECORD

The certificate, dated August 6, 1935, signed by Joseph L. Gill, Clerk, and sealed with the seal of The Municipal Court of Chicago, certifies the above and foregoing to be a true, perfect and complete transcript of the record as per

præcipe in a certain cause, except the bill of exceptions or report of proceedings, the original of which is incorporated herein according to law and by stipulation of the parties hereto, lately pending in said court, wherein City of Chicago is plaintiff and Marcus Hauge is defendant.

Said complete transcript of record is stamped: "Filed Aug. 7, 1935. Adam F. Bloch, Clerk."

Respectfully submitted, Babcock, Gilruth, Beck & McConnell, Attorneys for Marcus Hauge, Appellant.

[fols. 62 & 63] In Supreme Court of Illinois

[Title omitted]

Order as to Briefs—Filed August 22, 1935

Upon motion of the Appellant and without objection by the Appellee and it appearing that the cases hereinafter mentioned involve similar question of law,

It is Hereby Ordered, that in lieu of filing separate briefs in each of the following three cases now pending in this Court the appellants therein may join in filing fifteen (15) copies of one brief and fifteen (15) copies of one reply brief and the appellee may file fifteen (15) copies of one brief and all of said briefs shall stand as briefs in each of said three cases and shall bear the titles of said three cases, to-wit:

General No. 23224—City of Chicago, Appellee, vs. Isaac Waters, Appellant;
General No. 23225—City of Chicago, Appellee, vs. Marcus Hauge, Appellant; and
General No. 23226—City of Chicago, Appellee, vs. Frank Gorman, Appellant.

Enter this 20th day of August, A. D. 1935.
Francis S. Wilson, Justice, Supreme Court of Illinois.

[File endorsement omitted.]

[fols. 64 & 65] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER OF SUBMISSION—October 16, 1935

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellants have filed herein duly certified transcripts of the record of proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellees having entered motion to affirm said judgments and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cases are now ready to be taken, and said causes having been consolidated by order of Court on this date on suggestions of counsel, the said consolidated cases having been argued orally by Thomas C. McConnell for appellants and by Martin H. Foss and David Lefkovits for appellees, are here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that the consolidated causes be and the same are hereby taken under advisement.

[fol. 66] IN SUPREME COURT OF ILLINOIS

Dockets Nos. 23224-225-226—Agenda 66—October, 1935

THE CITY OF CHICAGO, Appellee,

v.

ISAAC WATERS, Appellant

THE CITY OF CHICAGO, Appellee,

v.

MARCUS HAUGE, Appellant

THE CITY OF CHICAGO, Appellee,

v.

FRANK GORMAN, Appellant

OPINION—Filed February 14, 1936

Mr. Justice HERRICK delivered the opinion of the court:

In the municipal court of Chicago separate proceedings were instituted by the city of Chicago against Isaac Waters, Marcus Hauge and Frank Gorman for the violation of section 2947 of the revised code of Chicago of 1931. The cases were separately tried on the same day without a jury, each defendant was found guilty and judgment was entered against him. In each case the trial judge certified that the validity of a municipal ordinance was involved and in his opinion the public interest required a direct appeal to this court. Each defendant perfected his appeal and the three cases were consolidated in this court for hearing.

Section 2947 of the ordinance in question provides, in substance, that every commodity sold in lot loads by weight delivered by truck within the city should be weighed by a city public weigh-master, and that his certificate of weight for each such lot should be delivered by the driver or person in charge of the truck or other vehicle to the purchaser or consignee of the load at the time of delivery and before any of the commodity is removed from the vehicle. Section 3623 provides that the public weigh-master's weight certificate shall state, inter alia, the commodity weighed, the date, the name and address of the purchaser or con-

signee, the conveyance in which the commodity is loaded, and the tare weight and the net weight of the commodity contained in such vehicle. The section proceeds: "In no case is any public weigh-master to state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight as specified herein," etc.

In addition to the attack made on the ordinance the defendants contend that the coal severally trucked by them was appropriated to the contract of purchase in Morris, Illinois, and then and there became the property of the buyer; that the ordinance has no application to the deliveries made by the defendants because the sale was made and completed without the corporate limits of the city of Chicago.

We will first take up the issue as to whether the sale was [fol. 67] made and completed in Morris or Chicago. The evidence common to the three cases is that the appellants delivered coal in truck-load lots to purchasers living in Chicago, none of which coal was weighed by a city of Chicago public weigh-master and no public weigh-master's certificate had been issued, as required by the provisions of the ordinance in question. The defendants are severally non-residents of Chicago, Hauge and Waters living at Morris and Gorman at Blue Island. Each owns his own truck. The coal delivered was secured by each defendant from a coal company at Morris. The company has an independent coal dealer or broker residing in Chicago who sells the coal of the coal company. The company takes orders at times direct from the customer, but there is no evidence in any of the cases to show that situation applies to any sale here. The usual custom of the business is that a statement of the account is rendered by the coal company and delivered to the truck-driver. No separate charge is entered thereon for the trucking service. The driver collects for the coal, deducts his charges for trucking and either pays the remainder to the broker in Chicago or the coal company at Morris, whichever is the more convenient for the driver If payment is made to the coal company, it in turn pays the Chicago broker for his services. The coal is sold delivered in the purchaser's bin by the company. The truck driver receives his orders to load his truck and where to make delivery from the coal company. None of the de-

fendants ever had any transaction with the customer to whom delivery was made, was not employed by the customer to haul the coal, the customer gave no directions for the delivery of the coal and had no control over the vehicle in which the coal was transported. The details of the method of transportation and delivery were arranged by the coal company. The load trucked by Hauge was for three different customers. He received the statement of the account from the Chicago broker, with the names of the customers and the quantity of coal to be delivered to each one. The defendant Waters received a statement from the coal company for the load of coal delivered by him. The statement showed a flat price of $18, plus tax, for three tons, and showed the coal was purchased from a coal company which operated a mine at Morris. Gorman received his orders to deliver the coal from the mining company at Morris. He did not testify. The statement for the coal delivered by him was offered in evidence and showed that the customer paid a flat price of $11.50, plus tax, for three tons of coal.

It is the law that sales of personal property are regarded as made at the place where the vendor shows his assent to the sale by delivering the property sold to the vendee's carrier, in the absence of any agreement or any special circumstances showing a contrary situation. (Ill. State Bar Stat. 1935, chap. 121a, sec. 46, par. 49; City of Chicago v. DiSalvo, 302 Ill. 85; People v. Hill Top Mining Co., 300 id. 564.) The evidence here clearly shows that the carrier was neither selected nor designated by the purchaser, and that the purchaser, so far as he knew, was not paying any separate charge for the carriage of the coal. The price to [fol. 68] him was net, delivered by him by the seller. The defendants were clearly the agents of the coal company, and each sale was made within the city limits of Chicago.

There remains for decision the question of the validity of the ordinance. The defendants contend that the effect of the above two sections of the ordinance is to require that coal brought into the city of Chicago by truck direct from the mine to the consumer in Chicago, although weighed at the mine on State-tested scales, be unloaded within the city limits of Chicago, so that the truck can there first be weighed empty by a public weigh-master and then reloaded in order that both truck and coal can be re-weighed by the

same public weigh-master for the purpose of making the certificate described in section 3623 and required by section 2947, for the violation of which latter section the judgments rested. It is here urged that by reason of these requirements, as applied to the defendants, the ordinance is unreasonable, deprives the defendants of the equal protection of the law and deprives them of liberty and due process of law, in violation of section 1 of the fourteenth amendment to the Federal constitution and of section 2 of article 2 of the Illinois constitution.

This issue is one of first impression in this court, and we are not referred by either side to any decision where the precise question presented has been decided. The problem must therefore be resolved by the application of sound, fundamental legal principles. It is immaterial to the issues here that the coal in question was weighed outside of the city of Chicago on State-tested scales. The Weights and Measures act does not repeal, supersede or to any extent modify the right of a municipality to adopt an ordinance regulating the method of ascertaining the correctness of weights and measures. The power of the city to adopt the particular ordinance before us, together with its reasonableness, and that it was not subject to attack as making a classification obnoxious to the constitutional provision, was definitely decided in City of Chicago v. Wisconsin Lime and Cement Co., 312 Ill. 520. The attack here made on the validity and constitutionality of the ordinance is not the same, however, as was decided in that case.

The defendants, among other cases, rely on City of Chicago v. Kautz, 313 Ill. 196, as supporting their side of the issue as to the unreasonableness of the ordinance. In that case the provision of the ordinance authorizing a city inspector or his deputies, without reasonable grounds for suspecting a violation of the ordinance, to compel a vehicle-driver enroute to the place of delivery after his load had been weighed in conformity with the provisions of the ordinance, to re-weigh the load on scales selected by the inspector or his deputies, was held void as unreasonable. That provision did not affect the remainder of the ordinance. The case presented here does not grow out of an attempt to have any of the defendants here re-weigh his coal after having it once weighed over a Chicago public weigh-master's scales. The case is not authority, either helpful

or persuasive, of the correctness of the defendants' contention.

[fol. 69] In the determination of whether the ordinance is unreasonable and contrary to the grain of the constitutional provisions supra we must not be unmindful of those legal rules which have survived the test of many years for the determination of the reasonableness and constitutionality of statutes and ordinances. Where the ordinance is within the grant of power conferred by the legislature the presumption is in favor of the validity of the ordinance, and the burden is always on the party attacking its legality to show such invalidity (Ferguson Coal Co. v. Thompson, 343 Ill. 20; City of Chicago v. Mayer, 290 id. 142; City of Chicago v. Washington Home, 289 id. 206; City of Chicago v. Shaw Livery Co. 258 id. 409); and the courts are without power to inquire into the wisdom of an ordinance or the motives that prompted its enactment, with the possible exception that municipal ordinances may be impeached for fraud by persons injuriously affected thereby. (People v. Grand Trunk Western Railway Co., 232 Ill. 292.) Ordinances which regulate the methods of weighing coal and other bulky articles sold and delivered within the boundaries of the municipality are strictly within the police power. City of Chicago v. Wisconsin Lime and Cement Co. supra; O'Malley v. Borough of Freeport, 96 Pa. St. 24, 30; McQuillan on Mun. Ordinances, sec. 485.

The opportunity to defraud the consumer in the sale of coal in load lots is great and the consumer has no adequate way to protect himself against being cheated. The delivery of true weights of coal to the consumer is a matter clearly related to the public welfare and the city has the right to adopt reasonable ordinances therefor. (City of Chicago v. Wisconsin Lime and Cement Co. supra.) The Court will take judicial notice of the fact that Morris is about sixty-two miles south and west of Chicago and that facilities are available for the transportation of coal by rail direct from Morris to Chicago. It is a matter of common knowledge that enormous quantities of coal are moved by both rail and water to Chicago and there held in coal yards, bins or structures for the storage of coal until moved therefrom to the purchaser, and occasionally coal may be hauled from the car or vessel in vehicles direct to the consumer. As to

coal thus transported and sold, an ordinary and natural way to regulate the weighing of the load would be to weigh the vehicle empty and then weigh the same vehicle after it is loaded for delivery to the vendee. The circumstance that has brought about the controversy here is, after all, one of transportation.

The defendants, who severally reside outside the city of Chicago, are hauling for a coal dealer whose source of supply is at Morris, Illinois, and who is selling, either through itself or broker in Chicago, direct to citizens who reside in the city of Chicago. It is more convenient, and doubtless less expensive, for the particular dealer to weigh his truck, both empty and loaded, on the public weigh-master's scale at Morris. This, however, is not a compliance with the ordinance. The defendants claim it is un- [fol. 70] reasonable to require them to unload their trucks after entering Chicago, weigh the truck empty and then reload and make delivery, and that the coal is always damaged and there is always a loss of coal occasioned by the unloading and re-loading. There may be a loss. Such loss sustained by unloading and re-loading, however, is common to those dealers who maintain coal yards and bins in the city of Chicago for the sale of coal and who comply with the ordinance. The object of the ordinance was not to benefit persons engaged in the coal business, or to give one competing dealer an advantage over another, or to enable some to comply with the ordinance readily and without inconvenience while others could not, but its purpose was to endeavor to give to the buyer of the coal, as nearly as practicable, honest weight. The defendants, non-residents of the city of Chicago, are asking for a practice of weighing, as applied to the business done by them in the city, which under the ordinance here would not apply to those truckers living in the city and delivering coal from the local yards or local dealers in the city to the consumer. To recognize the demand of the defendants would be to discriminate between the local truckmen and dealers in Chicago in favor of non-residents.

In State v. Nelson, 68 N. W. (Minn.) 1066, 34 L. R. A. 318, the Supreme Court upheld the validity of an ordinance of the city of Minneapolis which provided, in substance, that any person desiring to sell milk in the city be required to apply for a license, and before the license be issued the

dairy herds of the applicant should be examined as to healthfulness, etc., and any tubercular cows eliminated. The ordinance was objected to as being extra-territorial. The ordinance was sustained upon the principle that the offense, under the ordinance, was the sale of milk without a license within the corporate limits of the city, and if the owner of the dairy did not wish to have his dairy subjected to the regulation he need not sell his milk in the city. In In re Vandine, 6 Pick. (Mass.) 187, 17 Am. Dec. 351, an ordinance was declared valid which required garbage collectors operating in the City of Boston to be licensed, regardless of whether the licensee was a resident or non-resident of Boston. And so it was held in the case of City of Petersburg v. Cocke, 36 L. R. A. (Va.) 432, that a license tax imposed on the right to practice law in a city is properly collectible from an attorney who practices law therein although he is not a resident of the city.

This court sustained an ordinance requiring persons transporting coal in vehicles from places within to places outside the city to obtain a license before such movement could be made. (Gartside v. City of East St. Louis, 43 Ill. 47.) While the transportation feature there is the converse of that here, the loads originating without the city and moving into the city, the principle to be deducted is the same. If the city may lawfully license a business it may [fol. 71] impose reasonable regulations upon such business. The power to regulate carries with it the power to license, but in the absence of express statutory provision there can be no power to license without the power to regulate.

The ruling to be deducted from the authorities is, that where a city has enacted an ordinance within its charter or granted powers regulating a business, the non-residents who desire to follow such business within such municipality must conform to the requirements of the ordinance. If the defendant non-residents desire to compete in the trucking business in the Chicago market they must submit to the requirements of the ordinance regulating the business. The facts, if there be such, that it may be necessary to establish coal yards in Chicago, ship by rail in car-load lots, unload from the car and deliver to the purchaser, or submit to an unloading and re-weighing of the coal in the event that coal moves into Chicago by trucks, are incidental problems, to

be solved by the coal company in the event it desires to sell in the Chicago market. There is no discrimination made by the ordinance against the defendants. They have merely elected to do their business in a manner more convenient to them and different from the method prescribed by the ordinance. Instead of conforming to the ordinance they are asking that they — excepted from its terms.

The ordinance is not unreasonable and is not susceptible to the charges lodged against it of being a violation of the provisions named of the State and Federal constitutions.

The several judgments of the municipal court of Chicago are affirmed.

Judgments affirmed.

Mr. Justice Shaw, dissenting.

[fols. 72 & 73] In Supreme Court of Illinois

No. 23225

City of Chicago, Appellee,

vs.

Marcus Hauge, Appellant

Appeal from Municipal Court of Chicago

3432244

Judgment—February 14, 1936

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error;

Therefore, it is considered by the Court that the Judgment of the Municipal Court aforesaid be Affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error.

And it is further considered by the Court that the said Appellee recover of and from the said Appellant costs by it in this behalf expended, to be taxed, and that it have execution therefor.

[fol. 74] IN SUPREME COURT OF ILLINOIS

[Title omitted]

PETITION AND SUGGESTIONS THAT A REHEARING BE GRANTED IN THE ABOVE ENTITLED CAUSE UPON THIS COURT'S OWN MOTION—Filed February 19, 1936

Now come Palmer Byrne, duly appointed City Attorney of the City of Ottawa, LaSalle County, State of Illinois, and Elmer Mohan, duly elected State's Attorney of the County of LaSalle, State of Illinois, and S. J. Holderman, duly elected State's Attorney of the County of Grundy, State of Illinois, and Erwin Godfrey, duly appointed City Attorney of the City of Morris, Grundy County, State of Illinois, and ask leave to intervene herein as amici curiae and petition this Court to grant a rehearing on its own motion of the matters and things involved in the above entitled cause on the ground that matters of large public interest to the communities which your petitioners represent, as well as the People of the State of Illinois, are involved which apparently have not been taken into consideration by this Court in rendering its decision in the above entitled cause, and in support of this Petition present herewith the following suggestions:

[fol. 75] 1. That in holding that Section 2947 of the Municipal Ordinances of the City of Chicago is a reasonable ordinance, this Court has approved a method of reweighing that in practical effect imposes an embargo on Grundy and LaSalle County coal sold within the territorial limits of the City of Chicago and trucked from the mine to the consumer because the cost of loading and unloading trucks to comply with such ordinance amounts to approximately One Dollar ($1.00) a ton in labor and handling costs and destroys the price differential on such coal and makes it impossible for mine operators to compete with local dealers in the Chicago coal market.

2. That the effect of this decision will be to close the mines located in the Illinois River Valley, many of which are not adjacent to any rail, switch or spur connections and that depriving these mines of the right to truck coal will deprive them of their market for their produce and that approximately two thousand (2,000) families in Grundy County alone are dependent upon the mines affected by this decision for their livelihood.

3. That a large part of the commodities produced and sold by residents of Grundy and LaSalle Counties are sold in load lots within the territorial limits of the City of Chicago by weight and the effect of this ordinance is to impose a barrier on such trade and commerce with the City of Chicago whereas such weight can easily be determined after delivery in such manner as to protect the consumer of such produce and commodities in exactly the same way and with the same effect as the ordinance which this Court has held valid; that the decision of this Court affords a method by which the various communities of the State of Illinois can erect trade barriers between themselves against the public interest of the State of Illinois and the several communities thereof.

[fol. 76] 4. That in its said decision this Court has held valid a method of Weighing which in and of itself would make it impossible for the farmers of the State of Illinois to weigh their produce upon delivery in the City of Chicago in that it compels a dumping of the load and in that the ordinance ruled upon is a general ordinance applied to all commodities sold by load weights.

5. That a weighing of coal or other commodities together with the truck or vehicle in which they are contained prior to delivery and a return to the scales for the purpose of determining the tare weight or weight of the unloaded truck, as a practical matter, would give all the protection which the present ordinance affords to the consumer and provide a reasonable method of weighing, which the Illinois Valley mines can comply with.

6. That Section 2947 of the Ordinances of the City of Chicago does not expressly provide for the weighing of the trucks empty and then loaded but the ordinance has been so interpreted by the City Sealer of the City of Chicago,

and that the method of checking weights as long as trade and commerce has been carried on in this state has been to weigh the loaded vehicle and unload upon delivery to the consumer and then immediately return to the same scale and weigh the empty vehicle, which practice conforms to the laws of the State of Illinois, and to the special ordinance of the City of Chicago which deals specifically with coal, being Sections 3341, 3342, 3343 and 3344, of Article V of Chapter 67 of Revised Chicago Code of 1931, and which method the coal operators of the Illinois River Valley have been willing to comply with.

[fol. 77] 7. That this Court should take judicial notice of the fact that there are no public scales in the City of Chicago except in the yards of coal dealers operating within the territorial limits of such city and that such so-called public weigh-masters are coal yard employees and their scales are located in local yards competing with the Illinois River Valley mines and that such coal yards do not permit the dumping of coal in their yards so that a compliance with an ordinance providing for the dumping of coal in order to check the weighing which has already been had at the mines in accordance with all the provisions of the state statutes is impossible.

8. That valid ordinances of the City of Chicago provide penalties for short weight and that the present ordinance affords no protection against short weight because a dishonest driver can unload his truck within the city limits of the City of Chicago after a weighing over public weigh-master's scales within the city limits of said city, and while the Court has taken judicial notice of the fact that Morris, Illinois, is sixty-two miles from the City limits of the City of Chicago, it should also take judicial notice of the fact that there are 3,631 miles of streets and 912 miles of paved alleys within the city limits of the City of Chicago, upon any of which the truck driver delivering coal after a valid weighing might unload such coal.

9. That permitting a weighing loaded and then empty does not discriminate against Chicago coal dealers or truckers but merely recognizes the differences necessarily involved between trucking coal direct from mine to consumer and selling coal from a yard.

[fol. 78] 10. That the Chicago coal dealer operating from a yard weighs his coal from a yard not because he is forced by the ordinance but because he is operating a coal yard, and all the present ordinance requires such dealer to do is post a $1,000.00 bond and obtain a weighmaster's license, and then weigh his coal on his own scales, and to say that operating a coal yard is merely incidental to doing a coal business is to say that each trucker must open up a coal yard and cease doing a lawful, legitimate business of trucking coal from mine to consumer and fails to recognize that such method of doing business is lawful, legal and legitimate and amounts to putting the coal business in a "straight jacket" by preventing the adoption of economic and efficient methods of transporting coal from mine to consumer without rehandling.

11. The establishment and operation of a coal yard is not, as held by this Court, a mere incident to obtaining honest weights and to compel each trucker to operate a coal yard is to prevent him from doing a legal, lawful and legitimate business which does not result in any corresponding benefit to the public or the consumer of coal but operates only for the advantage of a coal dealer doing business from a yard and enhances the retail price of coal in the amount of the handling charge involved in dumping coal and then reweighing it, and the maintenance of a coal yard within the city limits of the City of Chicago.

Wherefore, the petitioners ask that on account of the large public interest involved in the questions presented to this Court in the above entitled matter that the cause should again be considered by this Court and a rehearing granted on its own motion, and that this Court either hold that the present ordinance is unconstitutional or should so construe the provisions of the ordinance as to permit a [fol. 79] method of weighing which will allow the tare weight of the vehicle used in the delivery of coal to be checked after such coal has been delivered to the consumer.

And your petitioners will forever pray.

S. J. Holderman. Erwin C. Godfrey. Elmer Mohan. Palmer C. Byrne.

Duly sworn to by S. J. Holderman. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 80] IN SUPREME COURT OF ILLINOIS

[Title omitted]

AFFIDAVIT OF MAILING—Filed February 19, 1936

STATE OF ILLINOIS,
County of Grundy, ss:

I, S. J. Holderman, State's Attorney of Grundy County, Illinois, and one of the petitioners in the above entitled cause, being first duly sworn on oath depose and say that I have sent by mail, postpaid, on the 18th day of February, A. D. 1936, to the Corporation Counsel of the City of Chicago, Barnet Hodes, to his office in the City Hall in the City of Chicago, a copy of the petition and the notice of presentment of said petition, which said notice stated the nature of the petition and the time and place of filing the same, and that the copy of the petition was a true and correct copy of the original petition filed; and, that I further sent by mail, postpaid, on the 18th day of February, A. D. 1936, to the firm of Babcock, Gilruth, Beck & McConnell, at 231 South LaSalle Street, in the City of Chicago, Illinois, a notice of the filing of the petition and a copy of the petition itself, [fols. 81-84] which notice stated the nature of the petition and the time and place of filing said petition.

S. J. Holderman.

Subscribed and Sworn to, before me, a Notary Public, this 18th day of February, A. D. 1936. Elsa A. Kussler, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 85] IN SUPREME COURT OF ILLINOIS

[Title omitted]

NOTICE OF PETITION FOR REHEARING—Filed February 21, 1936

To Honorable Barnet Hodes, Corporation Counsel, Attention: M. H. Foss, Esquire, City Hall, Chicago, Attorney for Appellee; Honorable Adam F. Bloch, Clerk Supreme

Court of Illinois, Springfield, Illinois; Honorable Samuel P. Irwin, Official Reporter, Bloomington, Illinois:

The appellants, and each of them, in the above entitled cause, hereby give notice, pursuant to Rule 44 of the Supreme Court of Illinois, that they will file a petition for rehearing herein within the time provided by said rule.

Babcock, Gilruth, Beck & McConnell, Attorneys for Appellants, Isaac Waters, Marcus Hauge and Frank Gorman.

[File endorsement omitted.]

[fol. 86] State of Illinois,
County of Cook, ss:

Owen Rall, being first duly sworn, on oath deposes and says that he served true and correct duplicate originals of the above and foregoing notice upon the persons to whom said notice is directed, by mailing to each such person, postage prepaid, a duplicate original of such notice addressed to him at the address given above, and that said notices so addressed were deposited in the United States mail at Chicago on the 20th day of February, A. D. 1936.

Owen Rall.

Subscribed and sworn to before me at Chicago, Illinois, this 20th day of February, A. D. 1936. Edna M. Radoll, Notary Public. (Notarial Seal.)

[fols. 87-107] Recital as to Filing of Petition for Rehearing

Be it Remembered, that to-wit, on the 6th day of March, A. D. 1936, the same being one of the days in vacation after the February term of said Supreme Court, and within the time for filing Petition for Rehearing provided by the Rules of said Court, Petition for Rehearing was filed in the office of the Clerk of said Supreme Court, which said Petition for Rehearing is in the words and figures as follows, to-wit:

Petition for rehearing, covering 18 pages, omitted from this print. It was denied, and nothing more by order of April 24, 1936.

[fol. 108] IN SUPREME COURT OF ILLINOIS

DISSENTING OPINION—Filed March 11, 1936

SHAW, J., and STONE, C. J., dissenting:

In our opinion the ordinance set forth in the foregoing opinion is unreasonable and should be held void. It shows on its face that it is cleverly designed for the purpose of conferring a monopoly in the coal business upon dealers residing within the city of Chicago, to the exclusion of other citizens residing outside of that city who have an entirely lawful right to sell to persons who live within the corporate limits. This is apparent from the requirement that the empty wagon or truck must be weighed before the load is delivered to the purchaser. We cannot perceive any reason why the purchaser could not as well be protected by weighing the empty wagon or truck after delivery. This would permit hauling the load across public scales to obtain the gross weight, the unloading of the commodity, followed by weighing the empty wagon or truck to obtain the tare weight, and the subtraction of the tare from the gross to obtain the net. This procedure would give an accurate net weight, which is the only point as to which the public may require protection, and if that is the true purpose of the ordinance, which it obviously is not, it would serve all legitimate purposes. Under such an ordinance, producers of coal or other commodities who live outside of Chicago could deliver their produce within that city and the residents of that city could have the benefit of whatever savings might be involved. It is clearly unreasonable to require that a load of coal coming into Chicago be unloaded, the truck weighed, then the coal re-loaded and weighed again. This extra and useless handling charge can inure only to the benefit of local dealers and it can only result in penalizing the consumer and the outside producer.

The holding in this case is in our opinion contrary to what we said in City of Chicago v. Kautz, 313 Ill. 196; "If, under the guise of protecting the public interests, the ordi-

nance arbitrarily interferes with private business and imposes unusual and unnecessarily restrictive regulations upon lawful occupations it is void. City of Chicago v. Hebard Express Co., 301 Ill. 570; McCray v. City of Chicago, 292 id. 60; Haskell v. Howard, 269 id. 550; Frost v. City of Chicago, 178 id. 250; Toledo, Wabash and Western Railway Co. v. City of Jacksonville, 67 id. 37." In the same case we pointed out that in order to come within the police power an ordinance of a regulatory nature must be of such a character as to tend in some degree toward the prevention of an offense or the prevention of public health, morals, safety or welfare.

The argument that the case of Wisconsin Lime and Cement Co. v. City of Chicago, 312 Ill. 520, is controlling here, is not impressive. This ordinance was there held to be reasonable as applied to coal dealers operating within the city of Chicago, on the ground that it was "liberal in permitting the dealers themselves to be appointed deputies for their own convenience." Here the record shows that the complaining mining companies cannot obtain weighmasters certificates, thus effectually shutting out of the markets of the city of Chicago a commodity that the people have a right to buy. To put the unreasonable and unnecessary burden of unloading, weighing the truck and reload-[fol. 109] ing the coal, upon those who would offer coal to residents of the city of Chicago, from the outside of that city, is not in the interest of the public welfare and is not necessary to secure honest weights.

It is quite as much in the interest of the public welfare that the people of the city of Chicago be afforded access to cheap markets for the necessities of life as it is that weights be watched. To so restrict access to such market by putting such unnecessary expense on the purchaser is clearly unreasonable.

It is likewise an unjust discrimination against large communities that happen to be so situated as to enable them to take coal from the ground cheaply and thus give a livelihood to thousands working in that business.

It is well known that there are many sources of cheap coal within trucking distance of Chicago, and that by loading directly onto a truck at the mine and unloading directly into the consumer's bin, many handling charges are avoided. While such competition is clearly disadvantage-

ous to Chicago coal dealers, it is certainly advantageous to the mine owners and those citizens of Chicago who wish to purchase this kind of coal. No one can doubt the legal right of these mine owners and consumers to deal directly with each other if they choose so to do, and, in our opinion, an ordinance which throws an artificial and unreasonable barrier across the path of this commerce, without any corresponding benefit to the health, morals, safety or welfare of the people, is void.

[fols. 110-113] In Supreme Court of Illinois

[Title omitted]

Order Denying Rehearing, etc.—April 24, 1936

Now on this day the Court having duly considered motion by City Attorney of Ottawa and others for leave to appear as Amici Curiæ and that rehearing be granted upon the Court's own motion and the Court being now advised in the premises overrules and denies the motion.

And the Court having also considered petition for rehearing filed in the consolidated cases and being now advised in the premises doth overrule the prayer of the petition and denies a rehearing of this cause.

[fol. 114] In Supreme Court of the United States

[Title omitted]

Assignment of Errors—Filed May 25, 1936

Comes now the appellant, Marcus Hauge, by Thomas C. McConnell and Owen Rall, his attorneys, and assigns the following errors on the record and proceedings in this cause:

1. The Supreme Court of Illinois erred in holding that Section 2947 of the Revised Chicago Code of 1931 is not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Illinois erred in holding that said Section does not deny to the appellant the equal protection of the laws guaranteed to the appellant by Section

1 of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of Illinois erred in holding that said Section does not deprive the appellant of liberty and property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of Illinois erred in holding that the said Section is a valid exercise of the police power.

5. The Supreme Court of Illinois erred in affirming the [fol. 115] judgment of The Municipal Court of Chicago.

6. The Supreme Court of Illinois erred in refusing to reverse the judgment of The Municipal Court of Chicago.

Wherefore, on account of the errors hereinbefore assigned, the appellant prays that the said judgment of the Supreme Court of the State of Illinois, entered the 14th day of February, 1936, which became final on April 24, 1936 by the denial of the petition of this appellant for rehearing, which was filed in apt time under Rule 44 of the Supreme Court of Illinois (355 Ill. 45), in the above entitled cause, be reversed and the judgment be entered in favor of this appellant.

Thomas C. McConnell, Owen Rall, Attorneys for Appellant.

May 25, 1936.

[fols. 116 & 117] [File endorsement omitted.]

[fol. 118] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 25, 1936

To the Honorable Clyde E. Stone, Chief Justice of the Supreme Court of the State of Illinois:

Your petitioner, Marcus Hauge, respectfully shows:

1. Your petitioner is the appellant in the above entitled cause.

2. The appellant, Marcus Hauge, appealed to the Supreme Court of Illinois from a judgment of The Municipal Court of Chicago finding the appellant guilty of a violation of Section 2947 of the Revised Chicago Code of 1931. Upon the hearing of said appeal by the Supreme Court of Illinois, the Court heretofore, to-wit, on February 14, 1936, filed an opinion and entered judgment affirming the judgment of The Municipal Court of Chicago. Thereafter and within the time permitted by Rule 44 of this Court (355 Ill. 45), the appellant gave notice to the attorney for the City of Chicago, appellee, the Clerk of the Supreme Court of Illinois, and the Official Reporter of decisions that he would file a petition for rehearing in said cause, which petition was thereafter, to-wit, on March 6, 1936, being within the time allowed by said Rule 44, duly filed herein. The [fol. 119] filing of said petition for rehearing operated to prevent the judgment of February 14, 1936 from becoming final, and upon consideration of said petition for rehearing and during one of the days of the April Term, A. D. 1936 of this Court, to-wit, on April 24, 1936, the Court denied said petition for rehearing and on said last mentioned date a judgment of this Court affirming the judgment of The Municipal Court of Chicago then and there became a final judgment.

3. In the Municipal Court of Chicago this appellant contended that the ordinance on weights and measures, the violation of which was charged in the court below, violates Article II, Section 2, relating to the due process of law of the Constitution of the State of Illinois, and violates Section 1 of the Fourteenth Amendment to the Constitution of the United States (Unprinted Record 81-82; Abst. 27).

4. Pursuant to Rule 39 of the Supreme Court of Illinois (361 Ill. xix), appellant in his brief filed in said cause in the Supreme Court of Illinois assigned among "Errors Relied On", the following:

"5. Section 2947 of the Revised Chicago Code of 1931 is invalid and unreasonable as applied to coal shipped in truck load lots from the mine outside Chicago to the consumer within the City of Chicago.

"6. Section 2947 of the Revised Chicago Code of 1931 is unconstitutional as applied to coal shipped in truck load lots

from the mine outside Chicago to the consumer within the City of Chicago because it is (a) unreasonable, (b) deprives the defendant of liberty and property without due process of law in violation of Article II, Section 2, of the Illinois constitution, and (c) deprives the defendant of the equal protection of the laws and of liberty and property without due process of law in violation of the first section of the Fourteenth Amendment to the Constitution of the United States."

5. By his brief and reply brief said appellant duly argued that said Section of the ordinance involved was in violation of the Constitution of the United States in the particulars [fol. 120] stated in such assignment of errors, and the opinion of the majority of the Court, written by Mr. Justice Herrick and filed in this cause on February 14, 1936, reported under the name of City of Chicago v. Waters (363 Ill. 125, 1 N. E. (2d) 396), expressly passed upon and overruled the contentions of said appellant in the following language:

"It is here urged that by reason of these requirements, as applied to the defendants, the ordinance is unreasonable, deprives the defendants of the equal protection of the law and deprives them of liberty and due process of law, in violation of section 1 of the fourteenth amendment to the Federal constitution and of section 2 of article 2 of the Illinois constitution."

* * * * * * *

"The ordinance is not unreasonable and is not susceptible to the charges lodged against it of being a violation of the provisions named of the State and Federal constitutions."

6. Section 237 (a), as amended February 13, 1925, of the Judicial Code of the United States provides (28 U.S.C.A., par. 344):

"(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant

to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

7. The Supreme Court of the United States has construed the words "statute of any State," contained in the above sub-section, as meaning and including a municipal ordinance enacted pursuant to power granted to such municipality by the law of the state: John P. King Mfg. Co. v. City Council of Augusta (1928) 277 U. S. 100, 72 L. Ed. 801.

[fol. 121] 8. The ordinance involved in the present case was passed by the City Council of the City of Chicago pursuant to Sections 1, 54, 55, 56 and 102 of Article V of "An Act to provide for the incorporation of cities and villages," as amended [Ill. State Bar Stats. (1935) c. 24, "Cities, Villages and Towns," pars. 65 (1), 65 (54), 65 (55), 65 (56) and 65 (102)].

9. For the reasons stated above, the final judgment entered herein is a judgment in the highest court of Illinois in which a decision in the suit can be had and there was drawn in question in said suit the validity of a statute of the State of Illinois, to-wit, the ordinance of the City of Chicago respecting the regulation of weights and measures enacted pursuant to statutes of the State of Illinois, on the ground of its being repugnant to the Constitution of the United States and the decision of the Supreme Court of Illinois was in favor of its validity, and therefore, under the Judicial Code of the United States in effect prior to January 31, 1928, the appellant would have been entitled to have said judgment reviewed by the Supreme Court of the United States on writ of error.

10. On January 31, 1928 the Congress of the United States passed the following act, as amended April 26, 1928, (28 U.S.C.A., Sections 861a and 861b):

"861a. The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"861b. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861a of this title substitutes for a writ of error."

That, therefore, in accordance with said Section 237 (a) of the Judicial Code of the United States and in accordance with the Rules of the Supreme Court of the United States, [fol. 122] your petitioner respectfully shows your Honor that the case is one in which under the legislation in force when the said Act of January 31, 1928 was passed, to-wit, under Section 237 (a) of the Judicial Code of the United States, a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

11. It is provided by the laws of the United States (U. S. Code, Title 28, Section 350), among other things, that:

"No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, * * *."

12. It has been held by the Supreme Court of the United States that the three months period within which an appellant may make application for the allowance of an appeal to the Supreme Court of the United States commences to run from the date when the judgment of the highest State court in which a decision could be had becomes final, and that the pendency of a seasonably filed petition for rehearing suspends the commencement of such period until such petition for rehearing is denied: Gypsy Oil Co. v. Escoe, 275 U. S. 498, 72 L. Ed. 393, 48 Sup. Ct. Rep. 112; so that the present petition for the allowance of an appeal is within apt time under the statutory provision referred to in the next preceding paragraph.

13. The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assign-

ment of errors filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Illinois by this ap-
[fol. 123] peal, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Supreme Court of the State of Illinois, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States in order that the decision and final judgment of the Supreme Court of the State of Illinois may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Illinois under his hand and the seal of said Court, may be sent to the Supreme Court of the United States within forty (40) days from the allowance of this appeal, as provided by law, and that an order may be made touching the security to be required of the petitioner and that the supersedeas bond tendered by the petitioner be approved, and that upon the approval of said bond this appeal may operate as a supersedeas.

Thomas C. McConnell, Owen Rall, Attorneys for Petitioner.

May 25, 1936.

[fols. 124-126] [File endorsement omitted.]

[fol. 127] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 29, 1936

The petition of Marcus Hauge, the appellant in the above entitled cause for an appeal to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Illinois entered herein on February 14, 1936,

which became final by the denial of said appellant's petition for rehearing on April 24, 1936, having been filed with the Clerk of this Court and presented herein, accompanied by assignment of errors and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered;

It is Hereby Ordered that an appeal be and is hereby allowed to the Supreme Court of the United States from the final judgment dated the 14th day of February, 1936 of the Supreme Court of the State of Illinois, which became final on April 24, 1936, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Illinois shall within forty (40) days from this date make and transmit to the Supreme Court of the United States under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be designated by præcipe [fol. 128] or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is Further Ordered that said appellant shall give a good and sufficient supersedeas bond in the sum of Five Hundred Dollars ($500.00), that said appellant shall prosecute said appeal to effect and answer all damages and costs if he fails to make his plea good, and that said supersedeas bond, when filed and approved, shall stay the sending down of the mandate herein and of all proceedings in this cause until the final disposition of this cause by the Supreme Court of the United States.

Comes now the appellant, Marcus Hauge, and presents his supersedeas bond conditioned in accordance with the foregoing order and in accordance with the statutes of the United States of America, and the undersigned having examined the said bond and the sufficiency of the surety or sureties signing said bond, finds the same to be proper in all respects and has approved the same and hereby orders that the same is approved and shall be filed by the Clerk of this Court and shall operate as a supersedeas herein.

Enter this 29th day of May, A. D. 1936.

Clyde E. Stone, Chief Justice of the Supreme Court of the State of Illinois. (Seal.)

[fol. 129] [File endorsement omitted.]

[fols. 130-134] Supersedeas bond on appeal for $500.00, approved and filed May 29, 1936, omitted in printing.

[fols. 135-145] Citation, in usual form, showing service on Barnet Hodes et al., filed June 8, 1936, omitted in printing.

[fol. 146] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF FILING PRÆCIPE—Filed June 8, 1936

To City of Chicago, Appellee, and Honorable Barnet Hodes, Corporation Counsel, Attention: Martin H. Foss, Esquire, Assistant Corporation Counsel, City Hall, Chicago, Illinois:

Pursuant to Paragraph 2 of Rule 10 of the Supreme Court of the United States, we hand you a copy of appellant's præcipe for transcript of record in the above entitled cause to be prepared by the Clerk of the Illinois Supreme Court, the original of which præcipe we shall file with said Clerk within three (3) days.

Thomas C. McConnell, Owen Rall, Attorneys for Appellant.

Received a copy of the above notice and of the appellant's præcipe for transcript of record therein referred to, this 5th day of June, A. D. 1936.

City of Chicago, Appellee, by Barnet Hodes, Corporation Counsel, by Martin H. Foss, Assistant Corporation Counsel.

[fols. 147 & 148] [File endorsement omitted.]

[fol. 149] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

APPELLEE'S PRÆCIPE FOR ADDITIONAL RECORD—Filed June 13, 1936

To the Honorable Adam F. Bloch, Clerk, Illinois Supreme Court, Springfield, Illinois:

You will please prepare and incorporate into the transcript of record in the above entitled cause on the appeal of appellant to the Supreme Court of the United States the following additional portions of the record in said cause:

1. Joint brief and argument for appellants.
2. Brief and argument for appellee.
3. Joint reply brief and argument for appellants.
4. This præcipe for additional record and proof or acknowledgment of service thereof on appellant.
5. Notice of filing this præcipe, with proof or acknowledgment of service thereof on appellant.

Barnet Hodes, Corporation Counsel; Martin H. Foss, Assistant Corporation Counsel, Attorneys for Appellee.

[fols. 150 & 151] Received a copy of the foregoing appellee's præcipe for additional portions of the record, this 12th day of June, 1936.

Thomas C. McConnell, Owen Rall, Attorneys for Appellant.

[fols. 152 & 153] [File endorsement omitted.]

[fol. 154] [File endorsement omitted]

[fol. 155] IN SUPREME COURT OF ILLINOIS

[Title omitted]

JOINT BRIEF AND ARGUMENT FOR APPELLANTS—Filed September 18, 1935

Statement of the Case

May it please the Court:

These three appeals are from three separate judgments entered by the Municipal Court of the City of Chicago

against the three defendants, respectively, for violating Section 2947 of the Revised Chicago Code of 1931, which in substance provides (Hauge Abst. 38) that every commodity sold in load lots by weight, delivered by truck within the city shall be weighed by a public weighmaster and that a public weighmaster's certificate of weight for each such [fol. 156] load shall be delivered by the driver or person in charge of the truck to the purchaser of such load at the time of the delivery and before any of the commodity is removed from the vehicle.

Another section of the ordinance, Section 3623 (Hauge Abst. 53), provides that the public weighmaster's weight certificate shall state, inter alia, the commodity weighed, the date, the name and address of the purchaser or consignee, and when the commodity is loaded in a vehicle, the total or gross weight of the commodity weighed and the conveyance in which it is loaded, the tare weight or the weight of the vehicle, and the net weight of the commodity contained in such vehicle. This section also provides (Hauge Abst. 53-54):

"In no case shall any public weighmaster state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight as specified herein • • •"

If valid, the effect of the two sections mentioned is to require that coal shipped into the City of Chicago by truck direct from the mine to the Chicago consumer, although weighed at the mine on State-tested scales, be unloaded inside of the city limits of Chicago so that the truck can first be weighed empty by a public weighmaster and then reloaded so that both truck and coal can be reweighed by the same public weighmaster for the purpose of making the certificate described in Section 3623 and required by Section 2947, of which the defendants stand convicted of violating.

The coal being delivered by the defendants in the instant cases was from the mine of the Morris Coal & Mining Company, at Morris, Grundy County, Illinois, and had been weighed there over State inspected scales (Hauge Abst. 22-26; Waters Abst. 14-15; Gorman Abst. 14-15.

[fol. 157] It was not and is not contended that these defendants were possessed of public weighmaster's weight

certificate as required by this ordinance. The prosecutions were defended in the lower court on the ground that the ordinance itself as applied to the facts in these cases is unconstitutional in that it is unreasonable in its provisions in requiring the reweighing of coal already weighed in accordance with the State laws and in that it discriminates against non-resident coal dealers, miners or operators and is so unreasonable in its terms as not to be authorized by the Enabling Act under which it was enacted (Hauge Abst. 26-35; Waters, 15; Gorman, 15).

The Honorable Frank M. Padden, Presiding Judge, has certified that the validity of a municipal ordinance is involved in these appeals and that in his opinion the public interest requires a direct appeal to the Supreme Court (Hauge Abst. 3-4; Waters, 5; Gorman, 5).

The section of the ordinance involved is the same in each of the three pending cases; the three cases were tried on the same day by Judge Padden without a jury; by stipulation certain evidence in the first case tried (Marcus Hauge) stood as evidence in the other two cases, and in many other respects the records in the three cases are identical. By an order entered in this Court, leave has been granted these appellants to file a joint brief and argument. The printed abstract filed in the Hauge case is complete and for sake of brevity the other two abstracts make certain cross-references to it. For this reason, the Hauge abstract alone is frequently referred to in this brief, and is referred to first where all three abstract references are given herein.

The evidence in the instant case disclosed that all three of the defendants below are coal truckers owning their own trucks (Hauge Abst. 17; Waters, 14; Gorman, 13). They are not engaged in the business of selling coal [fol. 158] (Hauge Abst. 21; Waters, 14; Gorman, 14). As already stated they trucked the coal in question from a mine owned by the Morris Coal & Mining Co. located in the City of Morris and delivered this coal to customers of that mine resident in the City of Chicago. In each instance the coal was weighed over state inspected scales at the mine in Morris (Hauge Abst. 24; Waters, 11, 14-15; Gorman, 11, 15). These scales were certified as accurate by the Inspector of Weights and Measures of the State of Illinois (Hauge Abst. 24; Waters, 14-15; Gorman, 15) and the delivery ticket

furnished to these defendants by the mine showed the gross, tare and net weight of the coal in each load (Hauge Abst. 14-15; Waters, 12-13; Gorman, 12-13).

All of the requirements of the State Statutes with reference to the sale of coal were complied with. (See Ill. State Bar Stats. 1935, Chap. 147, Secs. 5, 7, 8, 20.) The coal itself was sold F. O. B. the mine and the defendants were not employed by the mine but are independent contractors and collected their charge for the carrying of this coal as a separate item from the purchasers (Hauge Abst. 23-24; Waters, 14; Gorman, 14). It was further shown that the Morris Coal & Mining Co. could not obtain a license as a Public Weighmaster from the City of Chicago (Hauge Abst. 24). The reason for this is apparent in that the Company was resident outside the City of Chicago and, therefore, not subject to or embraced within the provisions of the Municipal Ordinances of the City of Chicago.

The evidence showed that if coal which has been weighed at the mine is required to be unloaded and weighed again inside the city limits of Chicago in compliance with the Chicago ordinances mentioned, the additional cost to the Chicago customer would be from fifty cents to seventy-five [fol. 159] cents per ton, and in some cases a dollar a ton (Hauge Abst. 24-25). This extra charge would be occasioned by the labor involved in unloading the coal from the truck in order to weigh the truck empty (thus getting "the tare") and then in reloading it again and weighing loaded—all before delivering it to the customer. It is also apparent that such rehandling of the bituminous coal which comes from the northern Illinois fields tends to break up the coal and destroy the grading which has been made at the mine tipple.

No charge of short-weight is involved in the present proceedings. Hauge testified (Hauge Abst. 18) without dispute that the inspectors who arrested him told him "they knew our weights were right and they didn't want to bother us with" reweighing.

Ralph C. McElvain's testimony in each case (Hauge Abst. 25) was that they had had no complaints from their customers as to short weights.

Frank Gorman testified in his case, without dispute, that the inspectors reweighed his two ton load and found it 450 pounds overweight (Gorman Abst. 14).

These cases therefore present technical violations of this ordinance, but the question raised is one of public importance far beyond the rights of these individual defendants.

We submit that if this ordinance is held valid, the consumers of coal in the City of Chicago will be unnecessarily deprived of cheap fuel and the competitive influence which such fuel has upon other coal prices, and the miners and dealers in coal not resident in the City of Chicago will be deprived of a home market for the commodity with the result that they and their employees are discriminated against in favor of local coal merchants in the City of Chicago and [fol. 160] indirectly in favor of employees and mine owners outside the State of Illinois. And we submit that no justification exists for such a result, because the protection of citizens of Chicago against short weights, which is the sole object of the ordinance which can be recognized as constitutional, does not require the drastic measure here sought to be applied to coal sold in load lots directly from the mine.

The evidence further disclosed that the sales of coal here involved took place in Morris and that the City Sealer of the City of Chicago is attempting to interfere with property owned by the purchasers of such coal under the guise of enforcing an ordinance.

Errors Relied On

1. The Court below erred in holding that the ordinance in question is reasonable and valid.

2. The Court below erred in refusing to rule that the burden of proof was on the plaintiff, City of Chicago, to show that the sale of coal involved in these proceedings to the persons receiving said coal from the defendants' trucks took place within the corporate limits of the City of Chicago.

3. The Court below erred in refusing to find that the title to the coal involved in these proceedings passed to the purchasers upon its being loaded in trucks at the mine in Morris, Illinois.

4. The Court below erred in entering judgments in favor of the appellee and against these appellants.

5. Section 2947 of the Revised Chicago Code of 1931 is invalid and unreasonable as applied to coal shipped in truck load lots from the mine outside Chicago to the consumer within the City of Chicago.

[fol. 161] 6. Section 2947 of the Revised Chicago Code of 1931 is unconstitutional as applied to coal shipped in truck-load lots from the mine outside Chicago to the consumer within the City of Chicago because it is (a) unreasonable, (b) deprives the defendant of liberty and property without due process of law in violation of Article II, Section 2, of the Illinois constitution, and (c) deprives the defendant of the equal protection of the laws and of liberty and property without due process of law in violation of the first section of the Fourteenth Amendment to the Constitution of the United States.

[fol. 162] Points and Authorities

I

The ordinance involved is invalid because when applied to trucks carrying coal from mines located outside the City of Chicago to purchasers residing in such city, it imposes unreasonable requirements upon the reweighing of coal necessary to obtain a weighmaster's certificate.

Wisconsin Lime & Cement Co. v. Chicago, 312 Ill. 520.
Ill. State Bar Stats. 1935, Chap. 24 "Cities and Villages", ss. 65 (54), 65 (55), 65 (91).
City of Chicago v. Kautz, 313 Ill. 196.
People v. Bruner, 343 Ill. 146.
Boshuizen v. Thompson & Taylor Co., 360 Ill. 160, 165.
City of Chicago v. Hebard Express Co., 301 Ill. 570.
McCray v. City of Chicago, 292 Ill. 60.
Haskell v. Howard, 269 Ill. 550.
Frost v. City of Chicago, 178 Ill. 250.
Toledo, Wabash & Western Ry. Co. v. City of Jacksonville, 67 Ill. 37.
Revised Chicago Code, 1931, ss. 2939, 2947, 2950, 2951, 2953, 3342, 3445, 3623.

[fol. 163] II

The ordinance in question can only regulate a sale or delivery of coal when the title to the coal passes to the purchaser within the territorial limits of the City of Chicago and in the instant case the coal involved in the proceeding was appropriated to the contract in Morris, Illinois and then and there became the property of the buyer and therefore this ordinance has no application.

Ill. State Bar Stats., 1935, c. 121a, "Sales" secs. 22, 49.
Gass and Vestal v. Corporation of Greenville, 36 Tenn. 62.
Rex v. Woolatt, 11 Ont. L. Rep. 544.
City of Lamar v. Weidman, 57 Mo. App. 507.
People v. Young, 237 Ill. 196.
City of Chicago v. DiSalvo, 302 Ill. 85.
People v. Hilltop Mining Co., 300 Ill. 564.
City of Carrollton v. Bazzette, 159 Ill. 284.
Town of Cortland v. Larson, 273 Ill. 602.

[fol. 164] Argument

I

The ordinance involved is invalid because when applied to trucks carrying coal from mines located outside the City of Chicago to purchasers residing in such city, it imposes unreasonable requirements upon the reweighing of coal necessary to obtain a weighmaster's certificate.

Section 2947 of the ordinance in question provides (Hauge Abst. 38):

"Every load of any commodity, produce or other article or articles of merchandise sold in load lots by weight, delivered by wagon, truck or other vehicle within the city, shall be weighed by a public weighmaster; a certificate of weight for each such load, issued by such public weighmaster, shall be delivered by the driver or person in charge of the wagon, truck, or other vehicle used in the delivery, to the purchaser or consignee of such load, or to his or their agent at the time of the delivery and *before any of the commodity, produce or other article or articles of merchandise is removed from the vehicle* * * *." (Italics ours.)

In order to obtain such a certificate from a public weighmaster, the weighing must take place in accordance with Section 3623 of the ordinances which provides among other things, (Hauge Abst. 53-54):

"In no case shall any public weighmaster state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight as specified herein; * * *."

[fol. 165] Said Section 3623 also provides (Hauge Abst. 53,), that the certificate shall certify:

"the kind of vehicle and the name and address of the purchaser or consignee of the commodity weighed; when the commodity is loaded in a vehicle, the total or gross weight of the commodity weighed and the conveyance in which it is loaded, together with the driver and any other person who may be on the vehicle when weighed, and of the horses, if a horse-drawn vehicle and the horses are weighed; the tare weight or the weight of the vehicle, including driver and any other person who may have been on the vehicle when weighed while loading and including the horses if they were weighed when the loaded vehicle was weighed; the net weight of the commodity, produce, article or articles contained in such vehicle, or the net weight of the commodity, produce, articles or articles when not contained in a vehicle at the time of weighing * * *."

These sections of the Revised Chicago Code of 1931, therefore, require that after coming within the city limits (where alone a public weighmaster may be found) the coal here involved be unloaded from the truck and the truck weighed to obtain the tare weight and then reloaded and the truck and coal weighed together to obtain the gross weight, and the net weight is then obtained by subtracting the tare weight from the gross weight. As the certificate requires the certification of all these weights before delivery to the customer, the reweighing operation and the consequent rehandling of the coal must take place between the time that the truckers enter the territorial limits of the City of Chicago and the time the coal is delivered to the customer.

In the case of Wisconsin Lime & Cement Co. v. Chicago, 312 Ill. 520, the section of the Chicago ordinance here in

question, requiring a public weighmaster's certificate, was [fol. 166] held to be valid and reasonable as applied to the business of a coal dealer operating out of coal yards located within the territorial limits of the City of Chicago. In that case this Court held the ordinance reasonable as applied to that state of facts because it found (page 524):

"The ordinance is liberal in permitting dealers themselves to be appointed weighmasters or have their own employees appointed deputies, for their own convenience."

In the instant cases, the proof shows that the Morris Coal & Mining Co. can not obtain a weighmaster's certificate because it is not within the territorial limits of Chicago (Hauge Abst. 22). These individual non-resident defendants likewise and for the same reason would be unable to meet the requirements of obtaining a weighmaster's certificate from the City of Chicago.

The same ordinance operates much more harshly—and as we shall show, unnecessarily so—in the present instances than it did in the Wisconsin Lime & Cement Co. case. The facts to which the ordinance is applied differ in the present three cases from the facts in that case; furthermore, there has been a marked change in business methods of distributing coal since that decision.

The trucking of coal into cities such as Chicago is a fairly recent development and has created a new method of marketing and selling coal. While it threatens the high price charged by coal dealers located within such cities, it makes available large deposits of cheap fuel to the citizens of such cities and makes available city markets to the mine operators of this state. It is a matter of common knowledge that there exists within trucking distance of the City of Chicago numerous "strip" mines where coal can be [fol. 167] cheaply mined adjacent to the highways of this state and trucked into the City of Chicago. There is, therefore, available to the residents of such city large deposits of cheap fuel unless local coal dealers are able to maintain the embargo which the present ordinance places against truck load shipments from the mines. The coal operators owning and mining such coal, with the development of hard roads, are able to deliver this coal to consumers in Chicago by truck and thus save to the consumer the large freight charges incurred when coal is brought in from outside the

State of Illinois. The combined saving to the consumer of coal occasioned by "strip" operations and cheap transportation by truck and the consequent avoidance of a dealer's handling charges are as herein pointed out in a large part unnecessarily nullified by the application of the terms and provisions of the ordinance in question.

The ordinance here in question is designed for the sole ostensible purpose of protecting the consuming public from short weight. It was not designed to prevent the creation of new marketing methods or to protect an established practice of doing coal business. It was passed by the City of Chicago under Article V of the Cities and Villages Act (Ill. State Bar Stats. 1935, Chap. 24, ss. 65 (54), 65 (55), 65 (91)), empowering the City Council "to regulate the inspection- weighing and measuring of brick, lumber, firewood, coal, hay, and any article of merchand-se * * * to provide for the inspection and sealing of weights and measures * * * to tax, license and regulate * * * public scales, * * *."

Under this enabling act the City Council is only granted power to pass an ordinance for the purpose of protecting, and not for the purpose of penalizing, the general public. [fol. 168] In the case of Wisconsin Lime & Cement Co. v. Chicago, 312 Ill. 520, already mentioned, the situation was in no respect similar to the case presented here. In that case no reweighing of coal was involved. In that case the Wisconsin Lime & Cement Co. was refusing to have its coal weighed by a public weighmaster, although the coal was originally loaded in the City of Chicago and although the company itself could become a public weighmaster. In the instant case a valid weighing has been had in compliance with State statutes in effect at the place (Morris) where the coal is appropriated to the contract of sale. The ordinance in question without securing any corresponding advantage for the public when applied to the facts shown in the instant case, compels a rehandling of the coal so that a tare weight can be established in accordance with an ordinance in effect at the place of delivery (Chicago) and before its delivery.

In the later case of City of Chicago v. Kautz, 313 Ill. 196, this Court held (p. 203) that a section of the ordinance in question which attempted to give the city officials power

to reweigh coal which had already been weighed was unreasonable and was

"entirely foreign to the subject of providing and maintaining accurate standards of weights and measures. It authorizes interference with the orderly conduct of a lawful business when there is no reasonable ground for suspecting that the law is being violated or the public welfare threatened. It is an abridgement of the privileges and immunities of the citizen without any legal justification, and it is therefore void."

This Court further said at page 202 of its opinion:

"At no place in the Statute is the authority given to direct the re-weighing of a load of coal which has been weighed by a person authorized to do the weighing on an approved scale."

[fol. 169] In the instant cases the coal involved was weighed over state-inspected scales and there is no reason to suppose and no presumption can be indulged that state inspectors are more lax or less efficient than city inspectors or that a weighing over state-inspected scales does not afford as much protection to the public as weighing over a city-inspected scale. The public in the instant case is further protected by the ordinance provisions, hereinafter pointed out whereby any purchaser can demand a weighing over a city-inspected scale (Sec. 2951; Hauge Abst. 40) and by the provisions of the ordinance providing for the prosecution and fining of any person guilty of delivering short weight (Secs. 2953, 3343; Hauge Abst. 41-42, 46-47).

Merely because this Court has ruled on the reasonableness of an ordinance as applied to a particular set of facts or a given situation does not preclude a determination of whether or not such ordinance is reasonable when applied to another situation and another set of facts, particularly when social or economic changes have taken place since such case has been decided or a new method of doing business has developed. (People v. Bruner, 343 Ill. 146, Boshuizen v. Thompson & Taylor Co., 360 Ill. 160, 165.)

The law is well settled, as stated by this Court in the case of City of Chicago v. Kautz, 313 Ill. 196, 202:

"While a city has, under its general charter power to enact ordinances of a regulatory nature, authority to pass

all necessary police ordinances to carry into effect these regulations, such regulatory ordinances must be reasonable and must not unnecessarily contravene the natural rights of individuals affected by them. Under the guise of police regulations the personal rights or liberties of citizens cannot be arbitrarily invaded."

[fol. 170] See also:

City of Chicago v. Hebard Express Co., 301 Ill. 570.
McCray v. City of Chicago, 292 Ill. 60.
Haskell v. Howard, 269 Ill. 550.
Frost v. City of Chicago, 178 Ill. 250.
Toledo, Wabash & Western Ry. Co. v. City of Jacksonville, 67 Ill. 37.

In the instant case, the proof shows a valid weighing under the State Statutes over state-inspected scales at Morris, Illinois (Abst. 24). As pointed out in the statement of this case at the beginning of this brief, to obtain a weighmaster's weight certificate of the City of Chicago, the defendants here would be required to reweigh the coal within the city limits of Chicago and unload and reload the coal in the process of such reweighing. The cost of the labor involved in this operation must be borne by the consumer and, therefore, it is apparent that Chicago coal merchants operating out of yards located in the City of Chicago are able to maintain a price above the normal competitive price level to the extent of the cost entailed in this operation. This, we submit, is an unreasonable charge against the people of Chicago for protection against short weights because as hereinafter pointed out there is a reasonable method of protecting such consumers which does not necessitate the costly operation above described.

When all the provisions of the ordinance are read, it is quite clear that the purchasers of coal in the City of Chicago are adequately protected from short weighing by other provisions of the ordinance which are not unreasonable and which do not impose an unreasonable burden upon [fol. 171] the persons engaged in this business and upon the consumer of this coal. Thus, Section 2950 of the city ordinances provides (Hauge Abst. 38-40):

"It shall be the duty of such person, firm or corporation delivering such load and of the driver or person in charge

of the vehicle used in the delivery thereof, upon the request of the inspector of weights and measures or of any of his deputies or the consignee or purchaser, to convey such load to some scale selected by the inspector of weights and measures or such deputy or such consignee or purchaser and permit the weighing of the gross weight of such load, and, after the delivery of such load, to return forthwith with the vehicle and equipment used in the delivery thereof to the same scale and permit the ascertaining of the tare weight for the purpose of verifying the net weight of such load as shown by the weight certificate, * * *"

To this provision there can be no objection because its enforcement does not require the unloading or reloading of the coal, before delivery. This section provides a reasonable method for determining the net weight, that is, permits the weighing of the coal and vehicle together before delivery of the coal and the return after the delivery to the scale to determine the tare weight, i. e., the weight of the empty vehicle.

The vice of Section 2947 of the ordinances, as applied to the coal sold from a mine outside the City of Chicago, is that the delivery ticket required must prior to the delivery, show the tare weight, therefore making it imperative that the trucker dump the load, weigh the truck empty and then reload and reweigh loaded before delivering the coal. This, we submit, is an unreasonable restraint on a legitimate business, namely, the sale and shipment of coal by truck direct from mine to the consumer, and in practical effect places an embargo upon coal trucked into the city. [fol. 172] The City of Chicago is thereby deprived of natural resources adjacent to the city limits and state coal operators are deprived of the Chicago market all with no corresponding advantage to the consumer that could not be obtained merely by a change in the ordinance in either of the two following ways: (1) by providing that each truck should carry its certified tare weight marked on the vehicle by a public weighmaster or (2) by providing that after having truck and load weighed, the driver might deliver the coal, returning to the same public weighmaster at once with the empty truck to have the tare weight of his truck determined after such delivery. Either of these two methods would be reasonable and would give the consumer

all the advantage of the present ordinances without discriminating against the out-of-town trucker in favor of the local coal dealer. Since there is a reasonable method of exercising the police power which imposes no undue burden upon the citizen another method to accomplish the same result which does impose such burdens must be held unreasonable.

The requirement that net and tare weights must be officially determined prior to delivery, although the truck is already loaded, is inferentially recognized as unreasonable by the Chicago city council because under all other sections of the ordinance dealing with the official verification or determination of net and tare weights after a commodity is loaded, such weights may be determined after the delivery of the load to the purchaser. (See Sections 2939, 2950, 2951, 3342, and 3445; Hauge Abst. 37, 38, 40, 43, 48.)

It is significant that in each of such sections a method of reweighing the coal, or other commodity, to determine whether or not short weights exist is provided which does not involve rehandling the coal. Under the above sections the requirement contained in Section 2947 (here under [fol. 173] consideration) that net and tare weights must be verified prior to delivery is inferentially recognized as unreasonable by the city council by providing in every other instance for the determination of these weights by weighing the empty vehicle after the delivery of its contents has been made to the purchaser thereof.

The departure in the instant case from this clear manifestation of the intent of the city council as to what constitutes a reasonable method of reweighing is the provision contained in Section 3623 of the ordinance which provides, (Hauge, Abst. 53-54):

"In no case shall any public weighmaster state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight specified herein; * * *"

This section applied to the facts in the instant case and taken in conjunction with the provisions of Section 2947 (Hauge, Abst. 38) means, as already pointed out, that the defendants convicted in this case must dump their loads upon arriving in Chicago, permit the weighing of the truck

empty to get the tare weight, then reload their trucks to get the gross weight even though they have had a valid weighing in Morris and have been provided with a delivery ticket as provided by the Statutes of the State of Illinois. This is unreasonable since a reasonable method exists of verifying the weights which does not involve this onerous burden.

To summarize: the ordinance here is unreasonable because there is a reasonable method, as shown by the other sections of the same ordinance which have been cited, to obtain net, tare and gross weights to protect the consumers from short weighting without compelling the rehandling of the coal inside the City of Chicago and before delivery. There is no reason for assuming that the weights of the [fol. 174] truckers' trucks would vary more than the 1% allowed by ordinance between trips from Morris to Chicago and an ordinance could provide that the truck be weighed by a public weighmaster and its tare weight certified and exhibited on the truck itself.

It is submitted that the cost involved in complying with the section in question demonstrates its unreasonableness because such unnecessary cost imposes a burden upon commerce and operates for the protection of Chicago coal dealers and against the interests of the general public in that it relieves the coal dealer from competition which the consumer is entitled to. It operates to the prejudice of these defendants in imposing an unlawful restriction on the perfectly lawful business of hauling coal direct from mine to customer.

II

The ordinance in question can only regulate a sale or delivery of coal when the title to the coal passes to the purchaser within the territorial limits of the City of Chicago and in the instant case the coal involved in the proceeding was appropriated to the contract in Morris, Illinois and then and there became the property of the buyer and therefore this ordinance has no application.

The testimony shows that the defendants, Hauge, Gorman and Waters owned their own trucks (Hauge, Abst. 17; Waters, Abst. 14; Gorman, Abst. 13); that they received orders at the mine at Morris, Illinois to truck coal to its

customers (Hauge, Abst. 23). For this trucking they received $2.50 a ton (Hauge, Abst. 17, 18) and made no claim to the moneys received for the coal but remitted it to the mine either directly or indirectly through its brokers (Hauge, Abst. 21, 26).

[fol. 175] The entire transaction was described by Hauge when he testified (Hauge, Abst. 21) that he went to the mine every morning and waited for an order for a load. The only money he received was from the customer of the mine and of that money he deducted his trucking charge and remitted the balance. He was, therefore, acting as a collecting agent for the mine but he was employed and paid by the customer for the trucking (Hauge, Abst. 22). The delivery of the coal was F. O. B. the mine in Morris (Hauge, Abst. 24). Under the Uniform Sales Act (Ill. State Bar Stats. 1935, Chap. 121a, "Sales", secs. 22, 49) the title to this coal passed to the buyer upon its appropriation to the contract, and this is so whether the buyer chose the carrier or trucker or not. The title to the coal having passed to the buyer before the coal entered the territorial limits of the City of Chicago, any interference with this coal was an illegal interference with the buyer's property and the ordinance could have no application.

In the case of Gass and Vestal v. Corporation of Greenville, 36 Tenn. 62, the court had under consideration an ordinance requiring that "all hay that is bought and brought within the limits of said corporation, to be used by persons residing within its limits, shall be weighed on the hay-scales * * *" and providing a fine for its violation. The defendants went outside the city and bought hay for their own use in the plaintiff corporation but not for resale and refused to weigh such hay on the city scales. It was held therein that the ordinance could only be construed to apply to sales made within the corporation. At page 64 the court says:

"It is obvious that the ordinance in question operates upon the *seller* and not upon the *buyer*. No one would be heard to say that it was intended to prohibit a farmer of the county from selling a stack or load of hay, *on his farm*, [fol. 176] to a member of the corporation, without having the same weighed. And, as the ordinance does not operate upon the *buyer*, it is clear that the latter has a perfect right

to haul the hay home for his own use, within the corporation, without being required to have it weighed. To such a case, the ordinance can have no application." (Italics in original.)

And in Rex v. Woolatt, 11 Ont. L. Rep. 544, the defendant was charged with having delivered one ton of coal without having weighed the same on the market scales as prescribed by an ordinance of the municipality of Windsor which required, "that all coal bought, sold, or delivered in said city shall be weighed upon the market scales * * *."

The court held that the ordinance would only apply to sales made in the city and we quote this language of the court at page 546 of its opinion:

"It seems to me that this provision must be limited to such articles as are marketed or exposed for sale within the limits of the municipality, and it cannot have been intended by the legislature that where such articles have been the subject of a completed contract of sale made beyond the limits of the municipality and the only act done within it is the delivery, there should be the right to impose what is practically a tax upon the vendor of the articles."

And see City of Lamar v. Weidman, 57 Mo. App. 507; People v. Young, 237 Ill. 196; City of Chicago v. Di Salvo, 302 Ill. 85; People v. Hilltop Mining Co., 300 Ill. 564.

It has further been established by the decision of this Court that facts such as presented here do not constitute an evasion of a city ordinance. (See People v. Young, 237 Ill. 196.) Furthermore, if this ordinance applies to this transaction, it discriminates unlawfully against non-residents and is invalid. (City of Carrollton v. Bazzette, 159 Ill. 284; Town of Cortland v. Larson, 273 Ill. 602.)

[fols. 177 & 178] The ordinance ought not to be construed to apply to coal unless it is delivered inside the City of Chicago, and also title there passes. The trial court erred, therefore, in holding that title passed inside the City of Chicago and also in holding that the acts here shown by the record were covered by and were a violation of Section 2947 of the Revised Chicago Code of 1931.

We submit, therefore, that the defendants have committed no offense against any valid ordinance of the City of Chicago.

Conclusion

We submit that insofar as the ordinance in question requires a reweighing of coal already weighed over state inspected scales which reweighing involves a rehandling of the coal, such ordinance is unreasonable in its terms and provisions, discriminates against non-residents and is void. Further, that if the coal delivered in the instant case was appropriated to the contract at Morris, then title passed to the buyer and the sale was consummated outside the territorial limits of the City of Chicago and no violation of the ordinance is shown. In either event the conviction of the defendants, Hauge, Gorman and Waters should be reversed.

Respectfully submitted, Babcock, Gilruth, Beck & McConnell, Attorneys for Appellants. Thomas C. McConnell, C. Graydon Megan, Owen Rall, of Counsel.

September 18, 1935.

[fol. 179] [File endorsement omitted.]

[fol. 180] In Supreme Court of Illinois

[Title omitted]

Brief and Argument for Appellee—Filed October 8, 1935

Statement of the Case

May it please the Court:

The above entitled appeals are from three separate judgments entered against the appellants (defendants below), respectively, for violations of section 2947 of the Revised Chicago Code of 1931. There is a separate transcript of record in each case and a separate abstract of record, although the abstract in the Hauge case, No. 23225, purports to be the only complete one. The other two refer to certain portions of the Hauge abstract. The brief filed by appellants is a joint one entitled in all three cases. While

[fol. 181] the cases are similar and involve violations of the same ordinance the defendants are different and the witnesses and facts are different.

The ordinance is one enacted pursuant to the express delegation of authority contained in article V of the Cities and Villages act, giving power to cities in Illinois to regulate the inspection, weighing and measuring of coal and other merchandise, to provide for the inspection and sealing of weights and measures to enforce the keeping and use of proper weights and measures by vendors and to license and regulate public scales. This ordinance has already been examined by this court and in the case of City of Chicago v. Wisconsin Lime and Cement Co., 312 Ill. 520, pronounced reasonable and valid and "most commendable and essential to secure to the purchaser the weight of the commodity purchased and paid for."

The ordinance provides, inter alia, for the creation of an executive branch of the city government to be known as the department of weights and measures (Hauge Abst. 36), for the appointment of a head of the department (Hauge Abst. 37), for the appointment of public weighmasters and their bonding (Hauge Abst. 49, 50), and covers the matters of scales, charges for weighing and the issuance of weight certificates (Hauge Abst. 51, 53). Section 2947 relates to commodities sold in load lots and provides in part as follows (Hauge Abst. 38):

"Every load of any commodity, produce or other article or articles of merchandise sold in load lots by weight, delivered by wagon, truck or other vehicle within the city, shall be weighed by a public weighmaster; a certificate of weight for each such load, issued by such public weighmaster, shall be delivered by the driver or person in [fol. 182] charge of the wagon, truck, or other vehicle used in the delivery, to the purchaser or consignee of such load, or to his or their agent at the time of the delivery and before any of the commodity, produce or other article or articles of merchandise is removed from the vehicle, or such certificates shall be delivered to the inspector of weights and measures, or any of his deputies upon his or their demand."

Section 3623, entitled "Weight certificates" reads as follows (Hauge Abst. 53):

"Each public weighmaster shall issue a weight certificate, signed by him or his deputy, under his official seal, which certificate shall state thereon the following: The commodity, produce, article or articles weighed; the date; the name of the weighmaster or deputy weighmaster who did the weighing; the name and address of the person, firm or corporation for whom the weighing was done; the name of the driver of the vehicle bringing such commodity, produce, article or articles to the scales, or, if the same is not contained in a vehicle, the name and address of the person bringing the same to the scales; where contained in a vehicle, the kind of vehicle and the name and address of the purchaser or consignee of the commodity weighed; when the commodity is loaded in a vehicle, the total or gross weight of the commodity weighed and the conveyance in which it is loaded, together with the driver and any other person who may be on the vehicle when weighed, and of the horses, if a horse-drawn vehicle and the horses are weighed; the tare weight or the weight of the vehicle, including driver and any other person who may have been on the vehicle when weighed while loading and including the horses if they were weighed when the loaded vehicle was weighed; the net weight of the commodity, produce, article or articles contained in such vehicle, or the net weight of the commodity, produce, article or articles when not contained in a vehicle at the time of weighing. In no case shall any public weighmaster state in his certificate [fol. 183] the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight as specified herein; provided, however, that in the case of a divided load, by which is meant a load containing more than one order for the same or different purchasers or consignees, no penalty shall be imposed under this chapter by reason of the fact that the tare weight shown on the weight certificates is only the original tare weight of the vehicle and equipment before loading if in such case each order has been weighed separately and the net weight of each separate order or delivery is correctly shown on the weight certificate and such correct net weight is delivered."

It is admitted by appellants (Brief and Argument for Appellants, p. 3) that the truckloads of coal which they at-

tempted to deliver to Chicago users had not been weighed by a city of Chicago public weighmaster and that the prescribed certificates of weight had not been used and were not in possession of appellants for delivery to the coal purchasers. The sole ground of defense interposed in the court below and the principal error relied upon by appellants in this court to reverse the judgments was and is that the ordinance is invalid as being unreasonable and not authorized by the powers conferred upon the city in the Cities and Villages act. This was the precise question presented to and decided by this court in favor of the city of Chicago in the case of City of Chicago v. Wisconsin Lime and Cement Co., 312 Ill. 520.

The evidence common to the three cases is that appellants delivered coal in truckload lots to Chicago purchasers which coal was not weighed by a city of Chicago public weighmaster and for which public weighmasters' certificates of weight had not been issued, contrary to the provisions of the above mentioned ordinance; that they [fol. 184] were non-residents of Chicago, Hauge and Waters living in Morris, Illinois (Hauge Abst. 16, Waters Abst. 14), and Gorman at Blue Island, Illinois (Gorman Abst. 13); and that they owned their own trucks (Hauge Abst. 17, Waters Abst. 14, Gorman Abst. 13).

The Hauge Case

In this case the evidence shows that appellant Hauge hauled a load of egg lump coal from Morris, Illinois, to 2005 W. Cermak road, Chicago, Illinois, where he delivered it to a purchaser without a city of Chicago public weighmaster's weight certificate. (Abst. 11, 13) The evidence is somewhat confusing and contradictory but sufficient appears to show that the coal was first sold by the Morris Coal and Mining Company of Morris, Illinois to W. Burgess, an independent coal dealer residing and doing business in Chicago under the name of Northern Coal Company, and that Burgess resold the coal to a customer, one Tresca, residing at 2005 W. Cermak road, Chicago. The bill of the Morris company (Abst. 14) shows that the purchaser from it was W. Burgess. Burgess resold the coal in Chicago to Tresca. (Abst. 20) Hauge testified that he lived in Morris but did not have any office any place; that he got the particular load of coal at Morris, Illinois, from the Morris

Coal and Mining Company's mine. He got orders there to load his truck, sent there through the mine. (Abst. 17) At first he testified that he got the coal from the Morris company mine and paid them for the coal and that he himself sold the coal to the customer (Abst. 17) and that the coal was his coal (Abst. 18) and then in answer to the question, "Did you buy the coal from the Morris Coal and [fol. 185] Mining Company?", he answered: "I get the orders from the mine and I haul it up to the customer." (Abst. 18) He further testified that he collects from the customer and remits to the mine (Abst. 19) or Burgess (Abst. 21), after deducting his hauling charges. (Abst. 18, 19) He did not know the customer Tresca before he delivered the coal. (Abst. 19) He said: "That ticket was given me by a fellow who has an office here, who sends it down. The name of the company or agency here is Burgess. Burgess is connected with himself. He takes the orders from the customers here in Chicago." (Abst. 20) Referring to the bill or delivery ticket of the Morris company, Exhibit 1, (Abst. 14) he said: "The name on here is filled out to Burgess; Burgess' name is on it." (Abst. 20) Showing that Burgess resold the coal Hauge testified: "Burgess has got it made out to Tresca; not this particular bill I got at the mine, but the one he has got is billed out to the customer. This ticket is made out for a full load. I did not deliver a full load to this particular party. There were other customers, either two or three on the same load. I could not remember the name of who else I delivered to besides Tresca at that time. I can't remember now where I delivered the other two loads on that same truck. I delivered two tons to one and one ton to another, four tons altogether. They paid me. I pay Burgess for the coal. The customer pays me for hauling it." (Abst. 20, 21) "I pay Burgess for the coal afterwards. He has an office here in Chicago. The name on his office door is Tropic-Air Coal Company." (Abst. 22)

Ralph C. McElvain, president of the Morris Coal and Mining Company, who lives at Morris, Illinois, testified [fol. 186] on behalf of the appellant that his company sells coal. He said, "We sell coal to the customer. We have trucks around there that deliver the coal and collect for it. They collect the money for the coal, as well as for their own hauling. The customer pays them for hauling and

also pays them for the coal, and they pay us, turn the money back in to us when they get back. Then we also have offices which are brokers for us." (Abst. 22, 23) "Some of the offices send orders down and we get orders too. When we do get orders we turn them over to the trucker and he delivers the coal; that is, any trucker that might come along that does business with us." (Abst. 23) On cross examination he testified: "We do not have any office in Chicago. I know Mr. Burgess. Mr. Burgess has an office here. He does business under only one trade name, Northern Coal Company, and he has a trade name on his coal, which he calls Tropic-Air coal. The previous witness was in error. He got the trade name mixed up with his company. Under that trade name Mr. Burgess advertises here in Chicago for the sale of that coal and he procures some of these potential customers and he sends the orders down to us at the mine. We fulfill the order as sent to us by Mr. Burgess. I don't know whether you would call Mr. Burgess our customer or not. He is a kind of a jobber for us, yes. The names of the people he sends in are right on the ticket. We do not know anything about the customers he sends in. Sure we are concerned about the customer. We are not concerned so far as their credit rating is concerned; we get our money anyway. It is cash. We don't get the cash from Mr. Burgess. The truck driver gets it from the customer. He gives it to us or to Mr. Burgess, according to which is handier. In some cases he [fol. 187] gives it to Mr. Burgess and Mr. Burgess gives it to us. In other cases he gives it right direct to us. Supposing a payment is made direct to us by the trucker, we make a remittance to Mr. Burgess. He gets a jobber's price. Examining the delivery ticket (City's Exhibit 1) in this particular case, the delivery was not made to Mr. Burgess. It was made on Mr. Burgess' order. We billed Mr. Burgess for that. We charged this to Mr. Burgess, evidently. The customer paid for it. In this particular instance Mr. Burgess was not our customer; he was our jobber in the deal." (Abst. 25, 26)

Under this method of doing business, as described by the shifting testimony of the witnesses, appellants and the Morris company contend that the sales and deliveries of coal to Chicago customers are not subject to the city's ordinance although there is nothing in the evidence which shows

that the Morris company has any direct dealings with the customers in these particular cases or even knows them. As the trial judge remarked with reference to the Morris Coal and Mining Company (Abst. 31): "There is nothing indicating there was any privity of contract between the coal company and the customer." The Morris company had no account with any customer (Abst. 26) and there is a notable absence of testimony of any Chicago customer to show that he dealt direct with the mine or made any contract to purchase coal from the Morris company f. o. b. Morris, Illinois, or at any other place outside of Chicago, or had any dealings whatever with that company.

The certificate on the bill or delivery ticket (Abst. 14) to the effect that the coal was weighed by a public weighmaster and the seal attached thereto is a recognized authority of accuracy as prescribed by the Chicago Mu- [fol. 188] nicipal Code, is not supported by but is contrary to the facts shown of record, as the coal was not weighed by a city of Chicago public weighmaster or delivered with a Chicago public weighmaster's weight certificate.

The Waters Case

Appellant Waters was prosecuted and fined for violating the ordinance by delivering a truckload of coal to one Algren at 529 E. 112th street, Chicago, Illinois, without a public weighmaster's weight certificate. (Abst. 11) The bill or delivery ticket (Abst. 12) shows that the coal was purchased from the Grundy Mining Co., 3958 W. 111th street, Chicago, Illinois. The city inspector who follows Waters' truck to the customer's premises testified that Waters told him he was working for the Grundy Mining Company in Mount Greenwood and that the coal was from Morris, Illinois, and that it was weighed there. (Abst. 11) Waters did not know the customer, not even her name. (Abst. 14) There is an absence of testimony showing that Waters had any business dealings with the customer prior to the delivery of the coal or that any agreement had been made between them whereby he was to haul the coal for her and charge her the trucking fee. The bill of the Grundy Mining Co., (Abst. 12) shows that the customer paid a flat price, $18 for three tons, plus tax. It contains no item of trucking charge. Waters testified that the lady at 529 112th street paid him for hauling the coal from Morris.

(Abst. 14) There is nothing to show that the purchase of the coal was made elsewhere than in Chicago where the selling company had its office. Subject to the objection of plaintiff, city of Chicago, that it was not pertinent to the [fol. 189] issues in this case, it was stipulated that McElvain's testimony in the case of City of Chicago v. Hauge, would be the same in this (Waters) case. (Abst. 14) The so-called certificate on the delivery ticket (Abst. 12) which is to the effect that the coal was weighed by a public weighmaster and that the seal is a recognized authority of accuracy as prescribed by the Chicago Municipal Code is not supported by the facts shown of record, but contrary to them and a deceit upon the purchaser, as the coal was not weighed by a city of Chicago public weighmaster or delivered with a Chicago public weighmaster's weight certificate.

The Gorman Case

Gorman was fined $25 for violating the ordinance by delivering a truckload of coal to one Woodard at 4207 S. Parkway, Chicago, Illinois, without a Chicago public weighmaster's weight certificate. He hauled the coal for the Grundy Mining Co., which company gave him the order. (Abst. 14) The bill or delivery ticket shows the Grundy Mining Co. to have its place of business at 3058 W. 111th street, Chicago, Illinois. (Abst. 12) The city inspector who followed Gorman to the premises of the customer testified that Gorman said he was hauling for the Grundy Coal Mining Company and that the coal came from Morris, and that it was weighed at Morris. (Abst. 11) Gorman testified: "The Grundy Mining Company gave me this order. I haul for the Grundy Mining Company." (Abst. 14) There is an absence of testimony showing that Gorman had any business dealings with the customer prior to the delivery of the coal or that any agreement had been made between them whereby he was to haul the coal for [fol. 190] the customer and charge the customer the trucking fee. The bill of the Grundy Mining Company (Abst. 12) shows that the customer paid a flat price, $11.50 plus tax, for three tons of coal. It contains no item of trucking charge. There is nothing to show that the purchase of the coal was made elsewhere than in Chicago, where the selling company had its office. The testimony of Ralph C.

McElvain (clearly irrelevant in this case as it was in the Waters case) was stipulated into the report of proceedings subject to plaintiff's objection that it was not pertinent to the issues in this case. (Abst. 14) The certificate appearing on the bill or delivery ticket (Abst. 12) is the same as that appearing on the bills or delivery tickets in the other two cases and is not supported by but contrary to the evidence of record.

The argumentative s atements contained in the statement of the case portion of appellants' brief and argument, which state (p. 2) that the coal was being delivered from the mine of the Morris Coal and Mining Company at Morris, Illinois, are not supported by the record in either the Waters or the Gorman cases. Neither is the statement found on page 4, that the appellants trucked the coal from a mine owned by the Morris Coal and Mining Company located in Morris, supported by the records in the Waters and Gorman cases. The records in these cases only show that the coal came from Morris, Illinois, and that it was weighed there. The statement as to alleged discrimination in favor of Chicago coal merchants, found on page 5, is not supported by the record in either case and certainly not applicable to the Waters and Gorman cases for the reason that the sales in those cases were made by the Grundy Mining Co., doing business at 3058 W. 111th street, Chicago, Illinois. The statement [fol. 191] found on page 6 that the evidence discloses that the sales of coal took place in Morris is utterly inconsistent with the facts in the Waters and Gorman cases and it is not supported by the record in the Hauge case.

To meet the alleged errors of appellants and to sustain the judgments entered by the municipal court, appellee relies upon the following propositions: (1) The direct appeals to this court are not cognizable; (2) the ordinance involved is valid and authorized under appellee's charter powers; and (3) the ordinance is enforceable as applied to appellants and to the delivery by them of truckload lots of coal in Chicago.

[fol. 192] Points and Authorities

I

The direct appeals to this court are not cognizable.

In cases where the validity of an ordinance is not necessarily involved this court is without jurisdiction to entertain direct appeals.

City of Chicago v. Peterson, 360 Ill. 177.
City of Chicago v. Great Atlantic & Pacific Tea Company, 360 Ill. 620.

The municipal court did not pass upon the validity of the ordinance involved in these cases but merely found that appellants and their business of delivering coal in truckload lots to Chicago customers were subject to the ordinance.

The validity of the ordinance having already been adjudicated and sustained by this court in the case of City of Chicago v. Wisconsin Lime and Cement Company, 312 Ill. 520, it was not involved in the decisions of the lower court and is not now the subject matter of these appeals.

II

The ordinance is valid and authorized under appellee's charter powers.

The statutory authority for the enactment and enforcement of the ordinance is found in the following sections of the Cities and Villages act:

Sections 54, 55, 56, 66, 91 and 102 of article V, chapter 24, Illinois State Bar Statutes, 1935.

[fol. 193] The ordinance has already been examined and its validity sustained by this court.

City of Chicago v. Wisconsin Lime and Cement Company, 312 Ill. 520.

The facts involved in the Wisconsin Lime and Cement Company case are similar to those in the cases now before the court.

The business methods of distributing coal have not changed since 1924, the date of this court's decision. The need to protect coal users from dishonest weights is as

great today as it was in 1924. No reason is shown why this court should depart from its former decision.

Appellants, because they are non-residents of the city of Chicago, are not entitled to be favored over Chicago residents engaged in the business of hauling coal, or entitled to deliver coal in Chicago with less onerous restrictions than those applicable to Chicago dealers.

III

The ordinance is enforceable as applied to appellants.

Appellants and the deliveries by them of truckload lots of coal to Chicago customers come clearly within the terms of the ordinance.

Ordinance section 2947, Hauge Abst. 38.

Appellants were the employees of the sellers of the coal and not of the Chicago customers.

The sales to Chicago users were made in and the title to the coal sold them passed within the city of Chicago.

Delivery to appellant truckers did not pass title to the coal.

Charles v. Lasher, 20 Ill. App. 36.

[fol. 194] Under the Uniform Sales act the property in the coal passed in Chicago when it was delivered to the Chicago users.

Section 19, Rule 5, Chapter 121a, Illinois State Bar Statutes, 1935.

Appellants' authorities distinguished.

Argument

I

The direct appeals to this court are not cognizable.

Though the trial judge has certified (Hauge Abst. 3-4; Waters Abst. 5; Gorman Abst. 5) that the validity of a municipal ordinance is involved in these appeals and that in his opinion the public interest requires direct appeals to this court it sufficiently appears in the records of all three cases that the municipal court did not pass upon the validity of the ordinance but merely found that the

appellants and their business of delivering coal in truck-load lots to Chicago purchasers were subject to the ordinance.

This court has held that in those cases where the validity of an ordinance is not necessarily involved it is without jurisdiction to entertain the appeal.

City of Chicago v. Peterson, 360 Ill. 177.
City of Chicago v. Great Atlantic & Pacific Tea Company, 360 Ill. 620.

Furthermore it is not seen how the validity of the ordinance could have been passed upon by the lower court or now be the subject matter of these appeals in this court [fol. 195] when this court has already adjudicated the validity of the same ordinance. In the case of City of Chicago v. Wisconsin Lime and Cement Company, 312 Ill. 520, this court examined the same ordinance which is now involved in these appeals and pronounced it valid.

II

The ordinance is valid and authorized under appellee's charter powers.

The same ordinance which is involved in these appeals was subject to attack as to its reasonableness and validity in the case of City of Chicago v. Wisconsin Lime and Cement Company, 312 Ill. 520. The Wisconsin company contended that the city had no power, either expressed or necessarily implied, to pass the ordinance, also that the ordinance was unreasonable. In this court's opinion, prepared by Mr. Justice Cartwright, the powers enumerated in article V of the Cities and Villages act were examined and pronounced sufficient to support the ordinance. It was held that the legislative authority conferred upon the city included the authority to provide that commodities sold in loads by weight shall be weighed by a public weighmaster appointed by the city, and included supervision, oversight, control and the prescribing of methods to secure honest weights. On page 522 it is said:

"In buying ordinary articles the buyer generally may see the article weighed or have the means at hand to ascertain whether it is short weight, but when applied to load lots it was and is impossible for the purchaser to determine

the weight of the load. The purpose of the ordinance was most commendable and essential to secure to the purchaser [fol. 196] the weight of the commodity purchased and paid for, * * *."

And on page 523 it is said:

"The power to regulate necessarily includes the power to make the regulation effective and to provide for methods of weighing which will secure truthful weights. The method provided for such regulation is the appointment of a weighmaster required to give a bond and pay a small fee, instead of the weighing being done by the seller, without the knowledge or supervision of anyone or any method of ascertaining whether the scales are correct or the weighing honest. The power to pass such an ordinance is sustained by many decisions."

In concluding its opinion the court said (p. 524):

"There is no legal objection to the ordinance."

It is significant to note that the examination of the abstract and briefs of counsel in the Wisconsin company case (Abst. in that case pp. 22, 23; appellee's brief p. 1) shows that the company maintained coal yards not only in the city of Chicago but in surrounding suburbs and that from its Oak Park yard it delivered into Chicago territory 20% of the total tonnage leaving the yard. Appellants' attempt to distinguish this case, found on page 12 of their brief, as being a case in which the ordinance was held valid "as applied to the business of a coal dealer operating out of coal yards located within the territorial limits of the city of Chicago" is not, therefore, strictly accurate. Neither is it sound argument for appellants to contend that the ordinance declared valid in the Wisconsin Lime and Cement Company case should be declared invalid for the reason that the Morris Coal and Mining Company "cannot obtain a weighmaster's certificate because it is not within the [fol. 197] territorial limits of Chicago." The Morris company and its non-resident truckers have equal rights with residents of the city of Chicago to have coal weigher by city of Chicago public weighmasters.

Counsel for appellants contend on page 12 of their brief that the ordinance operates more harshly upon their clients

than it did in the Wisconsin Lime and Cement Company case and that there has been a marked change in business methods of distributing coal since that decision. They urge that this court's decision is no longer binding and that the ordinance declared valid in the year 1924 is not now valid in the year 1935. There is nothing substantial in this point. While the use of motor trucks for the transportation of many articles of merchandise has increased, motor trucks were used for the carriage of coal in 1924. It was to the application of the ordinance to the hauling of coal in truckload lots that the Wisconsin Lime and Cement Company objected in the case above referred to. We respectfully submit that no social or economic changes have in fact taken place since the Wisconsin Lime and Cement Company case was decided in 1924 which would warrant this court in overruling its decision in that case and in declaring invalid a salutary ordinance designed to "secure to the purchaser the weight of the commodity purchased and paid for."

If this ordinance were declared invalid or as not being applicable to the appellants or the Morris Coal and Mining Company, then such non-residents of the city of Chicago would secure an unfair advantage over the local coal dealers and the Chicago users of coal would be left unprotected in the matter of securing honest weights. This matter of secur- [fol. 198] ing honest weights and protecting the purchasing public against the widespread evil in selling commodities in load lots by weight with short weights or the use of padded weight tickets is of paramount necessity. It overrides the matter of price and also the matter of convenience to non-resident coal dealers or any added cost placed upon them in the form of having their coal weighed by the Chicago weighmasters in order to enable them to compete with the local coal merchants.

Appellants claim that the coal hauled by them was weighed over state inspected scales at Morris, Illinois (appellants' brief, p. 16) and for this reason the purchasers are protected and that the Morris company and its truckers should not be required to reweigh and deliver the coal to Chicago purchasers with city of Chicago weighmasters' weight certificates. It is not seen how this claim can be made in the Waters or Gorman cases as there is no proof in either one of those cases that the coal delivered was

weighed over state inspected scales. The contention is unsound as applied even to the Hauge case. This court will take judicial notice of the fact that Morris, Illinois is sixty-two miles distant from Chicago. It needs no stretch of the imagination to see that almost anything might happen to truckloads of coal, conveyed on a miscellaneous variety of trucks of different owners, while in transit from Morris to Chicago. A portion of the coal might be lost during this long haul or if the drivers were dishonest they might sell portions of it and trade some more of it for gasoline. Fortunately, however, we can turn from these imaginings to the security of this court's decision in the Wisconsin Lime and Cement Company case, which has guaranteed to Chicago purchasers of coal protection against deliveries of [fol. 199] all truckload lots except with city of Chicago bonded public weighmasters' certificates of weight.

Because of the adjudication by this court in the Wisconsin Lime and Cement Company case it seems unnecessary for us to discuss the sources of power upon which the city's ordinance rests. These are found in article V of the Cities and Villages act under section 54, to regulate the inspection, weighing and measuring of coal and any article of merchandise; section 55, to provide for the inspection and sealing of weights and measures; section 56, to enforce the keeping and use of proper weights and measures by vendors; section 66, the police power section; section 91, to tax, license and regulate public scales; and section 102, to pass all ordinances, rules and make all regulations, proper and necessary, to carry into effect the powers granted.

The argument of appellants, which is to the effect that the Morris Coal and Mining Company in order to comply with the city ordinance would be obliged to rehandle its coal in Chicago so that the tare weight might be established, is of little or no materiality to the case. That company is not entitled to any favoritism or advantage over Chicago coal dealers who are obliged to conform to the ordinance. If it wants to compete for business on the Chicago market it should be willing to submit to the local ordinance regulating the conduct of business on that market and not seek to break down salutary measures enacted for the protection of the public. If in order to comply with the city's ordinance it is found necessary to establish its own Chicago coal yard or to submit to a reweighing of its coal,

these are but incidents which it is called upon to work out [fol. 200] if it wishes to enjoy the Chicago business. Certainly it should not be permitted to defeat or evade so important a municipal regulation as appellee's weights and measures ordinance and deprive the public of protection against false weights in order to gain for itself a slight pecuniary advantage over its competitors or even to place itself in a position where it could furnish coal to Chicago users at a less price than that ordinarily paid. There is, however, no evidence in the records which tends to prove that the Morris company undersells Chicago coal dealers.

Appellants cite and place some reliance upon the case of City of Chicago v. Kautz, 313 Ill. 196. As no attempt is made to require appellants to have the coal delivered by them in Chicago weighed a second time over city of Chicago public weighmasters' scales, this case, of course, has no bearing upon the cases now before the court.

The claim that the city of Chicago and its inhabitants would be deprived of natural resources adjacent to the city, and state coal operators deprived of the Chicago market, if and when the city's ordinance is enforced against operators who are non-residents of the city of Chicago, is absurd. We doubt not that Chicago users will continue to get coal from down state sources and that down state coal operators will be accorded the privilege of doing business on the Chicago market as has been done in the past for many years. Manifestly any down state weighing is not a compliance with the city ordinance and would not protect Chicago purchasers against false weights. Manifestly the Morris Coal and Mining Company and the down state truckers of its coal should not be entitled to deliver coal in Chicago with less onerous restrictions than those applicable to Chicago dealers.

[fol. 201] III

The ordinance is enforceable as applied to appellants.

Under point II of the brief and argument for appellants it is contended that the ordinance in question can only regulate sales or deliveries of coal when the title to the coal passes to the purchasers within the territorial limits of the city of Chicago and in the instant cases the coal involved was appropriated to the contracts in Morris, Illinois, and

then and there became the property of the buyers, and therefore this ordinance has no application.

Such a contention as this is unsound and inapplicable to the cases at bar. The records in the Waters and Gorman cases do not warrant its being made, for those records are absolutely devoid of any proof to the effect that the title to the coal delivered passed to the purchasers outside of the limits of the city of Chicago. There is nothing to show in these two cases that the coal was not purchased in Chicago and "was appropriated to the contracts" in Chicago where the selling company had its place of business and the purchasers resided. There is the testimony of the witness Prendergast, (Waters and Gorman Absts. p. 11) the deputy inspector of the city, who said the truckers stated the coal came from Morris and it was weighed at Morris, but this falls short of establishing where the title to the coal in sales made by the Grundy Mining Company, a Chicago concern, passed to its purchasers. In the Hauge case there is evidence that the coal hauled was hauled from Morris, Illinois (Hauge Abst. 17) but there is no evidence as to where the title passed. There is evidence that it was billed to Burgess, a Chicago coal dealer who resold it in Chicago to [fol. 202] Tresca, the user. (Abst. 20) Mr. McElvain, the president of the Morris Coal and Mining Company, said (Hauge Abst. 24):

"That coal is sold, I would say, f. o. b. the mine." This is far short of establishing where the title passed and if it was meant to apply to the sale made by Burgess to his customer Tresca it is contradicted by the evidence to the effect that the coal was first sold by the Morris company to Burgess, an independent coal dealer doing business in Chicago under the name of Northern Coal Company (Abst. 25) and that Burgess resold the coal to Tresca (Abst. 20) and that the only contract between the seller and the Chicago user was between Burgess and the user and that the only seller that the Chicago purchaser knew was Burgess.

Regardless of where the title to the coal may have passed to the purchaser we fail to see that this point has any importance to the issues involved in these cases. The ordinance clearly controls all deliveries of coal made in the city of Chicago in truckload lots regardless of where the title to the coal may have passed. This ordinance has been upheld by this court. It provides in section 2947, with

reference to merchandise sold in load lots by weight, that every load "delivered by wagon, truck or other vehicle within the city, shall be weighed by a public weighmaster; a certificate of weight for each such load, issued by such public weighmaster, shall be delivered by the driver or person in charge of the wagon, truck, or other vehicle used in the delivery, to the purchaser or consignee of such load, or to his or their agent at the time of the delivery and before any of the commodity, produce, or other article or articles of merchandise is removed from the vehicle." (Hauge Abst. 38.)

[fol. 203] Certainly appellants were the agents of the sellers when they collected from them the price of the coal. The records do not support appellants contention that the truckers were the employees of the purchasers and that title to the coal passed to the buyers before the coal came into Chicago. There is not a particle of evidence that the purchasers ever knew of the existence of the Morris Coal and Mining Company or its mine at Morris, Illinois, at the time they ordered coal from Burgess in Chicago or the Grundy Mining Co., in Chicago. The attempt to make the truckers the employees or the agents of the purchaser-users is a sham. It is a self-serving scheme manifestly concocted by the Morris company in its strained effort to avoid the ordinance and deliver its coal to Chicago users without Chicago public weighmasters' weight certificates. The records in all three cases show that the appellant truckers were non-residents of Chicago, did not know the purchasers and that they were engaged and directed by the sellers of the coal. There is nothing to show that any customer knew that any one of these truckers existed previous to his appearance at the purchaser's premises when he was sent there by the seller with a truckload of coal. Up to that time there were no dealings whatever between the customers and the truckers. How then could there have been a relationship of principal and agent or employer and employee at the time the coal companies engaged truckers and directed them to load up and deliver coal to certain addresses in Chicago? The claim that there was in fact such a relationship is unfounded. By simply arguing for self-serving reasons that the truckers, then known only to the sellers and who were engaged by the sellers to haul the coal and collect the charges, were employed by the purchasers

[fol. 204] does not establish or even tend to establish the fact that the truckers were the employees of the purchasers. Appellants failed to produce as a witness any Chicago customer, realizing, we presume, that no Chicago customer would testify that he bought coal outside of Chicago and employed one of the appellants to haul it for him.

The contention that title to the coal passed to the users outside of Chicago is an absurdity. It finds no support in the records and manifestly is advanced for the self-serving purpose of avoiding compliance with the ordinance. There is an absence of evidence tending to show that any one of the Chicago customers had any dealings with the Morris Coal and Mining Company at the time the coal was ordered from Burgess in Chicago in the Hauge case or from the Grundy Mining Company in Chicago in the Waters and Gorman cases or that any one of the purchasers had ever heard that there was in existence such a company as the Morris Coal and Mining Company or even that there were coal mines at Morris, Illinois. How could contracts be made at Morris, Illinois or outside of Chicago if there were no contracts between the purchasers and some party or parties outside of Chicago or at least some knowledge on the part of the purchasers that they were dealing with a coal company located or having a mine outside of Chicago? The statement in appellants' brief that the title to the coal passed to the Chicago customers before the coal entered the territorial limits of the city of Chicago is, therefore, just a self-serving statement and not supported by the facts in the cases.

Furthermore, as a legal proposition delivery to a trucker or drayman is not regarded as delivery to a common carrier so as to pass title to the goods sold. Such was the [fol. 205] holding of the Appellate Court of Illinois, First District, in the case of Charles v. Lasher, 20 Ill. App. 36. In order to make the truckers in these cases the agents of the Chicago coal users it would be necessary to show that the customers had designated them to act as their agents. This has not been shown in either of the cases before the court and we contend that in the absence of such showing the municipal court was right in holding that the title passed inside the city of Chicago. If inhabitants of Chicago were to order loads of coal from a coal company having its principal place of business in Chicago (such are the facts in the

Waters and Gorman cases) and this were the extent of the dealings between the parties, it could not afterwards successfully be claimed that the private carriers engaged by the seller to haul the coal were the employees of the purchasers or that the purchasers had knowledge that the coal was not then in Chicago but came from outside of Chicago or that the purchasers were to take title to it at some place outside of Chicago. Appellants' counsel seem to argue without giving any thought to the matter of the intention of the purchasers. In the event the truckers engaged by the sellers to haul the coal misappropriated it or the coal were lost in transit and the purchasers never received it, would anyone imagine that any court would hold that the purchasers would have to pay for the coal? In the Hauge case the only person the purchaser had contact with was Burgess, the Chicago independent coal dealer. There is nothing in the record in this case to show that at the time the coal was ordered the purchaser was to employ a trucker or to take title to the coal at a point outside of Chicago. In the Waters and Gorman cases the purchasers dealt direct with a Chicago coal company so that they could not [fol. 206] have known that the coal was to come from outside the city limits or that they would be expected to take title to it at a point outside of Chicago.

Appellants rely upon sections 22 and 49 of the Uniform Sales act (chapter 121a, Illinois State Bar Statutes, 1935) to support their contention that the title to the coal passed to the purchasers outside of Chicago. This act provides that property in specific goods is transferred to the buyer "at such time as the parties to the contract intend it to be transferred." (Section 18.) The word "parties" means both parties to the contract. The matter is not left to the arbitrary determination of one of the parties. The very section which appellants cite refutes their contention. Section 19 (paragraph 22—appellants apparently have confused paragraph with section markings) under Rule 5 states:

"If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, * * * the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

There can be no doubt that the purchasers in the cases at bar, when placing orders specified and the sellers agreed

that the coal was to be delivered to purchaser Tresca at 2005 W. Cermak road, Chicago, (Hauge Abst. 11, 12) to purchaser Algren at 529 E. 112th street, Chicago, (Waters Abst. 11, 12) and to purchaser Woodard at 4207 S. Parkway, Chicago, (Gorman Abst. 11, 12). Certainly the records do not show that the contracts between the parties provided that the purchasers were expected to send for the coal. Section 46 (paragraph 49) which relates to delivery to a carrier on behalf of the buyer specifically exempts from the general rule (which is, when in the absence of a [fol. 207] contract the seller is authorized or required to send the goods to a buyer, delivery of the goods to a carrier is deemed to be a delivery to the buyer) the cases provided for in section 19, Rule 5, above referred to by us. So, it is not seen that the Uniform Sales act can be of material assistance to appellants in securing the reversal of the judgments.

The authorities relied upon by appellants' counsel to support their point as to the transfer of title are an early Tennessee case, decided in 1856, and an Ontario case. They are not controlling. Neither are they in point. To distinguish the case of Gass and Vestal v. The Corporation of Greenville, 36 Tenn. 62, it seems necessary only to point out what has already been pointed out in this brief, viz., that there is no evidence in the records in the cases at bar establishing the fact that the Chicago customers bought the coal outside of Chicago and hauled it in their own vehicles or employed their own truckers to haul it for them. There is only the unsupported argument of appellants' counsel that the title to the coal passed to the purchasers outside of Chicago and that the truckers were the employees of the purchasers. Likewise the case of Rex v. Woollatt, 11 Ont. L. Rep., 544, need be distinguished only to show that it is a decision based upon a state of facts different from the facts in the cases now before this court. For the same reason it seems unnecessary to discuss the other cases cited on this point in appellants' brief.

We therefore contend that the ordinance is valid and applicable to appellants and the deliveries of coal by them to Chicago customers and that the decision of this court in the case of City of Chicago v. Wisconsin Lime and Cement Company, 312 Ill. 520, which sustained the ordinance and

[fols. 208 & 209] held it essential to secure to purchasers honest weights, should not be disturbed.

Respectfully submitted, Barnet Hodes, Corporation Counsel, Attorney for Appellee. Martin H. Foss, David Lefkovits, Assistant Corporation Counsel, Of Counsel.

[fol. 210] [File endorsement omitted]

[fols. 211-228] In Supreme Court of Illinois

[Title omitted]

Joint Reply Brief and Argument for Appellants—Filed October 12, 1935

May it please the Court:

The statement of the case contained in Appellee's Brief when compared to that of the Appellants' discloses that any conflict in the evidence is immaterial. It is conceded (Appellee's Brief page 4), that the sole ground of defense interposed in the Court below and the principal error relied upon by the Appellants is that the ordinance is invalid as being unreasonable.

[fol. 229] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 230] In Supreme Court of the United States

Statement of Points to be Relied upon and Designation of Parts of Record to be Printed—Filed July 13, 1936

To Honorable Charles Elmore Cropley, Clerk, Supreme Court of the United States, Washington, D. C.:

Pursuant to Rule 13, paragraph 9, of the Rules of the Supreme Court of the United States, the appellant states that the points upon which he intends to rely in the appeal of the above entitled cause are as follows:

1. The Supreme Court of Illinois erred in holding that Section 2947 of the Revised Chicago Code of 1931, under which appellant was convicted, does not deny to the appellant the equal protection of the laws guaranteed to the appellant by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Illinois erred in holding that said Section 2947 does not deprive the appellant of liberty and property in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fol. 231] 3. The Supreme Court of Illinois erred in affirming the judgment of The Municipal Court of Chicago.

The appellant thinks that the following parts of the record are necessary for the consideration of this appeal, page references except where otherwise distinctly indicated being references to the numbers of the unprinted transcript of record now lodged with you:

Transcript page number.	Description of document.
1	Placita.
2 [1] to end of paragraph 3 on page 2 [36] both inclusive.	Pages 1 to end of paragraph 3 on page 36 of the abstract of record originally filed in the Supreme Court of the State of Illinois.
2 [54] commencing marginal page 120 to page 2 [56] both inclusive.	Page 54 of the abstract of record commencing with marginal page 120 through page 56 of said abstract.
3-4	Order of Mr. Justice Wilson dated August 20, 1935, filed August 22, 1935, allowing filing of joint brief in three cases.
5	Excerpt from pages 6 and 7 of the appellant's brief filed September 18, 1935 showing six "Errors Relied On".
6	Order entered October 16, 1935.

Transcript page number.	Description of document.
7-13	Majority opinion of Supreme Court of Illinois filed February 14, 1936.
14	Judgment entered February 14, 1936.
15	Order entered February 19, 1936.
16-21	Petition and suggestions of amicus curiæ that a rehearing be allowed filed February 19, 1936.
22-23	Affidavit of mailing petition and notice of amicus curiæ filed February 19, 1936.
[fol. 232]	
26-28	Notice of intention to file petition for rehearing and affidavit of mailing thereof, filed February 21, 1936.
29	Recital showing filing of petition for rehearing on March 6, 1936. (NOTE.—Omit petition for rehearing and in the printed record please indicate such omission.)
31-33	Dissenting opinion, filed March 11, 1936.
34	Order denying rehearing entered April 24, 1936.
37-39	Assignment of errors filed May 25, 1936.
40-46	Petition for appeal to Supreme Court of the United States, filed May 25, 1936.
47-65	Appellant's jurisdictional statement.

Transcript page number.	Description of document.
	(NOTE.—If the Clerk has previously printed said jurisdictional statement separately and it is proper to omit it from the printed record, then the Clerk will omit pages 47 to 65 in printing the record.)
66-68	Order allowing appeal dated and filed May 29, 1936.
69-72	Supersedeas bond, filed May 29, 1936, certificates attached, etc.
73-75	Notice to appellee required by Rule 12, paragraph 2 (b) of Supreme Court of the United States and proof of service on appellee of such notice and of the documents required to be served by paragraph 2 of said rule, filed June 8, 1936.
76-78	Citation to appellee and proof of service, filed June 8, 1936.
84-85	Notice of filing appellant's præcipe for record and proof of service, filed June 8, 1936.
86-87	Appellee's additional præcipe for record, filed June 13, 1936.
88	Proof of service of appellee's præcipe, filed June 13, 1936.
[fols. 233-34]	
96-119	Appellee's statement opposing jurisdiction.
	(NOTE.—If the Clerk has previously printed appellee's

Transcript page number.	Description of document.
	statement opposing jurisdiction separately and it is proper to omit it from the printed record, then the Clerk will omit pages 96 to 119 in printing the record.)
120-122	Motion of appellee to dismiss appeal or to affirm judgment of the Supreme Court of Illinois.
123	Certificate of Clerk of the Supreme Court of the State of Illinois.
	This statement of points intended to be relied upon and the designation of the parts of the record to be printed filed by appellant and any designation of additional parts of the record to be printed hereafter filed by appellee.

Respectfully submitted, Irwin T. Gilruth, Thomas C. McConnell, Owen Rall, Attorneys for Appellant.

Received a copy of the above document consisting of four typewritten pages, this 11th day of July, 1936.

City of Chicago, Appellee, by Barnet Hodes, Corporation Counsel, City of Chicago, E. S. Martin H. Foss.

[fol. 235] [File endorsement omitted.]

[fol. 236] IN SUPREME COURT OF THE UNITED STATES

APPELLEE'S DESIGNATION OF PARTS OF RECORD TO BE PRINTED —Filed July 17, 1936

To Honorable Charles Elmore Cropley, Clerk, Supreme Court of the United States, Washington, D. C.:

The appellee thinks that the following parts of the record, in addition to the parts designated by appellant, are

material for the consideration of this appeal and therefore designates the same to be printed by the clerk:

1. The pages of the abstract of record filed in the Supreme Court of Illinois not designated by appellant.
2. The portions of appellant's brief filed in the Supreme Court of Illinois not designated for printing by appellant.
3. Brief and argument for appellee filed in the Supreme Court of Illinois.
4. Page 1 of reply brief for appellant filed in the Supreme Court of Illinois.

[fols. 237 & 238] 5. All portions of appellee's statement opposing jurisdiction of the Supreme Court of the United States not designated for printing by appellant.

Respectfully submitted, Martin H. Foss, Counsel for Appellee, City of Chicago.

Received a copy of the above and foregoing appellee's designation of parts of record to be printed, this 15th day of July, 1936.

Irwin T. Gilruth, O. R., Thomas C. McConnell, O. R., Owen Rall, Counsel for Appellant.

[fol. 239] [File endorsement omitted.]

Endorsed on cover: Enter Irwin T. Gilruth. File No. 40,715. Illinois Supreme Court. Term No. 175. Marcus Hauge, appellant, vs. The City of Chicago. Filed July 9, 1936. Term No. 175, O. T., 1936.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Date of the judgment sought to be reviewed and date of application for appeal	1
State statute the validity of which is involved	14
Nature of the case and rulings below	15

Table of Cases Cited.

Adams v. Tanner, 244 U. S. 590, 61 L. Ed. 1336	16
Atchison, T. & S. F. v. Vosburg, 238 U. S. 56, 59 L. Ed. 1199	18
City of Chicago v. Waters, 363 Ill. 125, 1 N. E. (2d) 396	2, 10, 12, 20
Farmers Irrigation Dist. v. Nebraska, 244 U. S. 325, 61 L. Ed. 1168	18
Hutchinson Ice Cream Co. v. Iowa, 242 U. S. 153, 61 L. Ed. 217	18
John P. King Mfg. Co. v. City Council of Augusta, 277 U. S. 100, 72 L. Ed. 801	13
Lockner v. New York, 198 U. S. 45, 49 L. Ed. 937	16
Louis K. Liggett Co. v. Baldrige, 278 U. S. 105	18
Price v. Illinois, 238 U. S. 446, 59 L. Ed. 1400	18
Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131	16

Statutes Cited.

Act of Congress of January 31, 1928, as amended by the Act of April 26, 1928 (28 U. S. C. A. 861a and 861b)	15
Act of the Illinois Legislature "to provide for the incorporation of cities and villages," Article V, Sections 1, 54, 55, 56, and 102, as amended by Ill. State Bar Stats. (1935), C. 24, "Cities, Villages and Towns," Paragraph 65 (1)	13
Paragraph 65 (54)	14
Paragraph 65 (55)	14
Paragraph 65 (56)	14
Paragraph 65 (102)	14
Constitution of the United States, 14th Amendment, Section 1	2, 9
Illinois State Bar Stats. (1935) c. 147, par. 20	9
Judicial Code, Section 237(a), as amended by the Act of February 13, 1925 (28 U. S. C. A. 344)	13
Revised Chicago Code of 1931, Section 2939	19
2947	2, 7, 8, 9, 10
2950	19
2951	19
2955	3
3342	7, 16, 19
3445	19
3612	4
3613	4
3614	4
3616	5
3617	5
3623	3, 5, 7
Rules of the Supreme Court of Illinois, Rule 39 (361 Ill. xix)	9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 175

MARCUS HAUGE,

Appellant,

vs.

CITY OF CHICAGO,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS; THERE HEARD ON APPEAL FROM THE MUNICIPAL COURT OF CHICAGO

Honorable Frank M. Padden, Trial Judge

STATEMENT OF JURISDICTIONAL FACTS.

This is an appeal from the judgment of the Supreme Court of the State of Illinois—two of the seven judges dissenting—rendered on the 14th day of February, 1936, and becoming final by the denial of a petition for rehearing on April 24, 1936, which affirmed a judgment of The Mu-

nicipal Court of Chicago finding the appellant guilty of violating Section 2947 of the Revised Chicago Code of 1931 by delivering a load of coal trucked direct from a mine located in Morris, Illinois, to a purchaser in Chicago without reweighing the coal and obtaining as required by said section a public weighmaster's certificate showing the gross, tare, and net weight of the load. (*City of Chicago* v. *Waters*, 363 Ill. 125, 1 N. E. (2d) 396.)

The petition for allowance of an appeal to the Supreme Court of the United States is filed herewith on May 25, 1936, and will be presented on or before May 29, 1936, being within three months of the final judgment of the Supreme Court of Illinois.

The court held that this section of the Chicago ordinances (which requires every person delivering coal or other commodities in load lots to obtain a public weighmaster's certificate) applies to the appellant's business of trucking direct to the consumer coal weighed and graded at the mine in accordance with a State statute, and that as so applied said section does not violate Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Section 2947 of the Revised Chicago Code of 1931 is as follows (unprinted record, pp. 107-108):

> "2947. Commodities sold in load lots.] Every load of any commodity, produce or other article or articles of merchandise sold in load lots by weight, delivered by wagon, truck or other vehicle within the city, shall be weighed by a public weighmaster; a certificate of weight for each such load, issued by such public weighmaster, shall be delivered by the driver or person in charge of the wagon, truck, or other vehicle used in the delivery, to the purchaser or consignee of such load, or to his or their agent, at the time of the delivery, and before any of the commodity, produce, or other article or articles of merchandise is removed from the vehicle, or such certificates shall be delivered

to the inspector of weights and measures, or any of his deputies upon his or their demand. When delivery is made, in case no person is present to receive such commodity, produce or other article or articles of merchandise, and if the purchaser or consignee, or his or their agent, cannot be located, then the memorandum or certificate of weight hereinbefore provided for shall be posted conspicuously at the place of delivery, before any of the commodity, produce or other article or articles of merchandise is removed from the vehicle."

Section 3623, below, provides that "in no case shall any public weighmaster state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight as specified herein."

Other ordinances of the City of Chicago provide in effect that a dealer owning a scale *in the City of Chicago* may be licensed as a public weighmaster upon giving a $2,000 bond and that the employees of the coal dealer may be licensed as deputy weighmasters.

The sections of the Revised Chicago Code of 1931 so providing are contained in the record here and are as follows:

"2955. Weighmaster can weigh own commodities.] Nothing contained in this article [Regulations as to Weights and Measures] shall be construed to prevent any person, firm or corporation engaged in the business of selling any commodity, produce or article or merchandise which is ordinarily delivered by wagon, truck or other vehicle, from becoming public weighmaster and appointing deputy weighmasters to weigh the commodity, produce or article of merchandise being sold and delivered by such person, firm or corporation; and any weight certificate issued by such person, firm or corporation, or the deputies appointed by

same, covering commodities sold by such person, firm or corporation, shall be of the same effect as the weight certificate issued by any other public weighmaster." (Unprinted record, p. 110.)

"3612. Appointment.] Any person, firm or corporation owning a scale or scales suitable for weighing any commodity, produce or articles of merchandise in load lots, when contained in any wagon, auto truck or other vehicle, or in any quantity less than load lots when not contained in any wagon, truck or other vehicle, shall be eligible for appointment as a public weighmaster in the city of Chicago upon complying with the provisions of this chapter." (Unprinted record, p. 116.)

"3613. Application.] Any person, firm or corporation owning a scale or scales suitable for weighing as aforesaid desiring to be licensed as a public weighmaster, shall file an application in writing therefor which shall conform to the general requirements of this ordinance relating to applications for licenses, and shall set forth the location of the place of business for which such license is requested. * * *." (Unprinted record, p. 116.)

"3614. Bond—fee.] Such applicant shall also execute and present with his application a bond in favor of the city of Chicago in the sum of two thousand dollars, with such sureties as may be approved by the comptroller, conditioned for the faithful performance of such applicant's duties as a public weighmaster and for the payment by such public weighmaster of any fine or fines which may be imposed upon him, them or it for any violation of said applicant's duties as such public weighmaster. Upon compliance with the conditions above stated and upon payment to the city collector of the sum of twenty dollars as an annual license fee, the mayor may issue a license authorizing such applicant to act as a public weighmaster." (Unprinted record, p. 116.)

"3616. Deputy weighmaster.] Each public weighmaster shall have the power to appoint all necessary deputies to tend to such scales, but each such deputy weighmaster shall furnish a bond in the same sum and conditioned in the same manner as that furnished by the public weighmaster. Each such deputy weighmaster or the public weighmaster appointing him, shall pay to the city collector the sum of ten dollars for an annual license fee as such deputy weighmaster. Each public weighmaster appointing any deputy weigh master shall be answerable for any and all acts of such deputy weighmaster in connection with the weighing of any commodity over the scale or scales of such weighmaster; provided, that such responsibility on the part of the public weighmaster shall not relieve the deputy weighmaster of liability for his own acts. Any public weighmaster shall have the right, at any time after the appointment of a deputy by him, to cancel such appointment, and, upon cancelling such appointment, it shall be the duty of such public weighmaster to immediately notify the inspector of weights and measures that the appointment of such deputy has been cancelled, and thereupon such deputy shall cease to have any authority to weigh any commodity on the scales of such weighmaster." (Unprinted record, pp. 116-117.)

"3617. Scale—how provided.] Each public weighmaster licensed under the provisions of this chapter shall provide his own scales, which shall be of a kind or pattern approved by the inspector of weights and measures, and each such public weighmaster shall keep his said scales properly adjusted and repaired at his own expense. It shall be the duty of each public weighmaster to have such scales inspected by the inspector of weights and measures at least once every six months, and oftener if required." (Unprinted record, p. 117.)

"3623. Weight certificates.] Each public weighmaster shall issue a weight certificate, signed by him

or his deputy, under his official seal, which certificate shall state thereon the following: The commodity, produce, article or articles weighed; the date; the name of the weighmaster or deputy weighmaster who did the weighing; the name and address of the person, firm or corporation for whom the weighing was done; the name of the driver of the vehicle bringing such commodity, produce, article or articles to the scales, or, if the same is not contained in a vehicle, the name and address of the person bringing the same to the scales; where contained in a vehicle, the kind of vehicle and the name and address of the purchaser or consignee of the commodity weighed; when the commodity is loaded in a vehicle, the total or gross weight of the commodity weighed and the conveyance in which it is loaded, together with the driver and any other person who may be on the vehicle when weighed, and of the horses, if a horse-drawn vehicle and the horses are weighed; the tare weight or the weight of the vehicle, including driver and any other person who may have been on the vehicle when weighed while loading and including the horses if they were weighed when the loaded vehicle was weighed; the net weight of the commodity, produce, article or articles contained in such vehicle, or the net weight of the commodity, produce, article or articles when not contained in a vehicle at the time of weighing. In no case shall any public weighmaster state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight as specified herein; provided, however, that in the case of a divided load, by which is meant a load containing more than one order for the same or different purchasers or consignees, no penalty shall be imposed under this chapter by reason of the fact that the tare weight shown on the weight certificates is only the original tare weight of the vehicle and equipment before loading if in such case each order has been weighed separately and the net weight of each separate order or delivery is cor-

rectly shown on the weight certificate and such correct net weight is delivered." (Unprinted record, pp. 118-119.)

* * * * * * *

The unavoidable effect of the sections quoted is to require that coal shipped into the City of Chicago by truck direct from the mine to the Chicago consumer, although weighed at the mine on State-tested scales pursuant to State law, be unloaded inside the city limits so that the truck can first be weighed empty by a public weighmaster in order to obtain a tare weight for the purpose of making the certificate described in Section 3623, and required by Section 2947, under which latter section the defendant was convicted; and also that non-residents such as the appellant and the mine from which the coal is shipped cannot be licensed as public weighmasters and use scales at the point of original loading outside of the City of Chicago.

The proof shows that the cost of this rehandling of coal is approximately $1.00 a ton and that the coal being soft, its grade is broken down by such rehandling (unprinted record, p. 74). If the grade of the coal is broken down after loading at the mine, then it cannot be legally delivered in the City of Chicago because of Section 3342 of the Revised Chicago Code of 1931, which provides:

> "3342. Delivery ticket—requirements—verifying weight.] Any person, firm or corporation engaged in the business of selling, or selling and delivering, of solid fuel in the city shall provide the driver of the wagon, truck, or other conveyance with a separate delivery ticket for each kind, grade and size of solid fuel contained on the wagon, truck, or other conveyance bearing the name of the person, firm or corporation selling such solid fuel, showing the gross weight, the tare and the net weight of each kind, grade or size of solid fuel, and the name and address of the purchaser of said

solid fuel, or the person, firm or corporation to whom same is to be delivered, which said delivery ticket or tickets shall be delivered by the driver in charge of the wagon, truck, or other conveyance to each purchaser, or his agent or representative, or to the person to whom delivery is to be made, at the time of the delivery of the fuel and before such fuel or any part thereof is removed from such wagon, truck, or other conveyance. In the event that solid fuel is sold or offered for sale by a peddler, or by a dealer making sale or delivery in any other manner than by wagon, truck, or other conveyance, such peddler or dealer, shall deliver to the purchaser or intending purchaser, or his agent or representative, or the person to whom delivery is to be made, before the delivery of such fuel or any part thereof, or to the inspector of weights and measures of the city of Chicago upon his demand, a delivery ticket or tickets bearing the name of such peddler or dealer, his license number if a peddler or name and address if a dealer, and showing the net weight, and the kind, grade and size of the fuel sold or offered for sale. * * *." (Unprinted record, p. 112.)

It clearly appears, therefore, that it is impossible to engage in the business of selling coal to be delivered direct from mine to consumer without violating one or more of these provisions of the Chicago ordinances and, therefore, the effect of holding Section 2947 to be constitutional is to prohibit a perfectly legitimate and lawful business with no benefit to the public that cannot be obtained merely by checking the mine weights in some reasonable manner.

The mine from which the coal was sold is located at Morris, Illinois, and under the State statute on weights and measures (Illinois State Bar Stats., chapter 147) the scale there is inspected by the State Director of Trade and Commerce. The mine scale here involved had been so inspected (unprinted record, p. 73).

A State statute, independently of the city ordinance involved here, requires a delivery ticket in duplicate, as follows (Illinois State Bar Stats. (1935) c. 147, par. 20):

> "§20. It shall be unlawful to sell or offer to sell any coal, coke, or charcoal in any other manner than by weight. It shall be unlawful for any person to deliver any coal, coke, or charcoal unless each such delivery is accompanied by a delivery ticket and a duplicate thereof, on each of which shall be, in ink or other indelible substance, distinctly expressed in pounds, the gross weight of the load, the tare of the delivery vehicle, and the quantity or quantities of coal, coke, or charcoal contained in the vehicle used in such deliveries, with the name of the purchaser thereof, and the name of the dealer from whom purchased. One of these tickets shall be surrendered to the Director of Trade and Commerce, or any city inspector of weights and measures, upon his demand, for his inspection, and this ticket, or a weight slip issued by him when he desires to retain the original, shall be delivered to the said purchaser of said coal, coke, or charcoal, or his agent or representative at the time of the delivery of the fuel; and the other ticket shall be retained by the seller of the fuel. When the buyer carries away the purchase, a delivery ticket showing the actual number of pounds delivered to him must be given to him at the time the sale is made."

In The Municipal Court of Chicago the appellant contended that Section 2947 of the city ordinances was in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States (unprinted record, pp. 81-82), but the contention was overruled and The Municipal Court entered judgment against the appellant, finding him guilty and imposing a fine of $75.00 and costs (unprinted record, pp. 16-17).

The appellant appealed to the Supreme Court of Illinois and pursuant to Rule 39 of that court (361 Ill. xix) appel-

lant in his brief assigned among the "Errors Relied On" the following:

> "5. Section 2947 of the Revised Chicago Code of 1931 is invalid and unreasonable as applied to coal shipped in truck load lots from the mine outside Chicago to the consumer within the City of Chicago.
>
> "6. Section 2947 of the Revised Chicago Code of 1931 is unconstitutional as applied to coal shipped in truck load lots from the mine outside Chicago to the consumer within the City of Chicago because it is (a) unreasonable, (b) deprives the defendant of liberty and property without due process of law, and (c) deprives the defendant of the equal protection of the laws and of liberty and property without due process of law in violation of the first section of the Fourteenth Amendment to the Constitution of the United States."

By his brief and reply brief said appellant duly argued that said section of the ordinance involved was in violation of the Constitution of the United States in the particulars stated in such assignment of errors and some of the contentions of the defendant are succinctly stated in a dissenting opinion filed by Mr. Chief Justice Stone and Mr. Justice Shaw of the Supreme Court of Illinois (*City of Chicago* v. *Waters*, 363 Ill. 125, at p. 134, 1 N. E. (2d) 396, at p. 400), as shown by the following excerpt from such dissenting opinion:

> "In our opinion the ordinance set forth in the foregoing opinion is unreasonable and should be held void. It shows on its face that it is cleverly designed for the purpose of conferring a monopoly in the coal business upon dealers residing within the city of Chicago, to the exclusion of other citizens residing outside of that city who have an entirely lawful right to sell to persons who live within the corporate limits. This is apparent from the requirement that the empty wagon or truck must be weighed before the load is delivered

to the purchaser. We cannot perceive any reason why the purchaser could not as well be protected by weighing the empty wagon or truck after delivery. This would permit hauling the load across public scales to obtain the gross weight, the unloading of the commodity, followed by weighing the empty wagon or truck to obtain the tare weight, and the subtraction of the tare from the gross to obtain the net. This procedure would give an accurate net weight, which is the only point as to which the public may require protection, and if that is the true purpose of the ordinance, which it obviously is not, it would serve all legitimate purposes. Under such an ordinance, producers of coal or other commodities who live outside of Chicago could deliver their produce within that city and the residents of that city could have the benefit of whatever savings might be involved. It is clearly unreasonable to require that a load of coal coming into Chicago be unloaded, the truck weighed, then the coal reloaded and weighed again. This extra and useless handling charge can inure only to the benefit of local dealers and it can only result in penalizing the consumer and the outside producer.

"The holding in this case is in our opinion contrary to what we said in *City of Chicago* v. *Kautz*, 313 Ill. 196: 'If, under the guise of protecting the public interests, the ordinance arbitrarily interferes with private business and imposes unusual and unnecessarily restrictive regulations upon lawful occupations it is void. *City of Chicago* v. *Hebard Express Co.*, 301 Ill. 570; *McCray* v. *City of Chicago*, 292 id. 60; *Haskell* v. *Howard*, 269 id. 550; *Frost* v. *City of Chicago*, 178 id. 250; *Toledo, Wabash and Western Railway Co.* v. *City of Jacksonville*, 67 id. 37.' In the same case we pointed out that in order to come within the police power an ordinance of a regulatory nature must be of such a character as to tend in some degree toward the prevention of an offense or the preservation of public health, morals, safety or welfare.

"The argument that the case of *Wisconsin Lime and Cement Co.* v. *City of Chicago*, 312 Ill. 520, is con-

trolling here, is not impressive. This ordinance was there held to be reasonable as applied to coal dealers operating within the city of Chicago, on the ground that it was 'liberal in permitting the dealers themselves to be appointed deputies for their own convenience.' Here the record shows that the complaining mining companies cannot obtain weighmasters certificates, thus effectually shutting out of the markets of the city of Chicago a commodity that the people have a right to buy. To put the unreasonable and unnecessary burden of unloading, weighing the truck and reloading the coal, upon those who would offer coal to residents of the City of Chicago, from the outside of that city, is not in the interest of the public welfare and is not necessary to secure honest weights.

"It is quite as much in the interest of the public welfare that the people of the city of Chicago be afforded access to cheap markets for the necessities of life as it is that weights be watched. To so restrict access to such market by putting such unnecessary expense on the purchaser is clearly unreasonable."

The majority opinion of the Supreme Court, written by Mr. Justice Herrick, is reported under the title *City of Chicago* v. *Waters*, 363 Ill. 125, 1 N. E. (2d) 396, and contains the following, among other language:

"It is here urged that by reason of these requirements, as applied to the defendants, the ordinance is unreasonable, deprives the defendants of the equal protection of the law and deprives them of liberty and due process of law, in violation of section 1 of the fourteenth amendment to the Federal constitution.

* * * * * * *

"The ordinance is not unreasonable and is not susceptible to the charges lodged against it of being a violation of the provisions named of the State and Federal constitutions."

Section 237 (a), as amended February 13, 1925, of the Judicial Code of the United States provides (28 U. S. C. A., Sec. 344):

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The Supreme Court of the United States has construed the words 'statute of any State", contained in the above subsection, as meaning and including a municipal ordinance enacted pursuant to power granted to such municipality by the law of the state: *John P. King Mfg. Co.* v. *City Council of Augusta* (1928), 277 U. S. 100, 72 L. Ed. 801.

The ordinance involved in the present case was passed by the City Council of the City of Chicago pursuant to Sections 1, 54, 55, 56 and 102 of Article V of "An Act to provide for the incorporation of cities and villages", as amended [Ill. State Bar Stats. (1935) c. 24, "Cities, Villages and Towns," pars. 65 (1), 65 (54), 65 (55), 65 (56) and 65 (102)], which are as follows:

> "65 (1). Powers generally of city councils and presidents and boards of trustees in villages.] §1. The city council in cities, and the president and the board of trustees in villages shall have power to control the

finances and property of the corporation, and shall have in addition thereto the powers enumerated in sections 2 to 102 of this Article, each inclusive.

"65 (54). Inspection—Of merchandise.] §54. To regulate the inspection, weighing and measuring of brick, lumber, firewood, coal, hay, and any article of merchandise.

"65 (55). Inspection—Of weights and measures.] §55. To provide for the inspection and sealing of weights and measures.

"65 (56). Enforce use of same.] §56. To enforce the keeping and use of proper weights and measures by vendors.

"65 102). Ordinances and rules to execute powers —Limitation on punishments.] §102. To pass all ordinances, rules and make all regulations, proper or necessary, to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper: *Provided,* no fine or penalty shall exceed $200.00 and no imprisonment shall exceed six months for one offense."

The final judgment entered herein is therefore a judgment in the highest court of Illinois in which a decision in the suit can be had and there was drawn in question in said suit the validity of a statute of the State of Illinois (to-wit, the ordinance of the City of Chicago respecting the regulation of weights and measures enacted pursuant to statutes of the State of Illinois), on the ground of its being repugnant to the Constitution of the United States and the decision of the Supreme Court of the State of Illinois was in favor of its validity, and therefore, under the Judicial Code of the United States in effect prior to January 31, 1928, the appellant would have been entitled to have said judgment reviewed by the Supreme Court of the United States on writ of error.

On January 31, 1928 the Congress of the United States passed the following act, as amended April 26, 1928, (28 U. S. C. A., Sections 861a and 861b):

> "861a. The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.
>
> "861b. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861a of this title substitutes for a writ of error."

The present appeal, therefore, is a substitute for the review by writ of error existing as a matter of right prior to January 31, 1928, and is brought on the ground that the judgment of the highest court of Illinois sustained the validity of a statute of Illinois (*i. e.*, an ordinance of the City of Chicago) against the contention made below by the appellant that said statute was invalid because repugnant to the Constitution of the United States.

Since the complete and total destruction of a lawful and legitimate business must necessarily follow the sustaining of the ordinance in question, with far reaching consequences to the general public and to whole communities dependent for their existence upon this industry, a substantial constitutional question is presented both under the equal protection of the laws and the due process clauses of the Fourteenth Amendment to the Federal Constitution.

In similar situations, the Supreme Court of the United States has repeatedly held that no State by statute has the right to prohibit the doing of a lawful business under the exercise of its police power unless such prohibition is

necessary to protect the general welfare of the public. See:

Lockner v. *New York*, 198 U. S. 45, 49 L. Ed. 937;
Truax v. *Raich*, 239 U. S. 33, 60 L. Ed. 131;
Adams v. *Tanner*, 244 U. S. 590, 61 L. Ed. 1336.

The ordinances involved, requiring as they do the obtaining of the weight of the unloaded vehicle before delivery of the commodity contained therein, prohibit the trucking of coal direct from mines located outside the City of Chicago to Chicago consumers even though such coal has been weighed there in accordance with State laws and over State-inspected scales. In brief, the ordinances, the pertinent sections of which are set out above, require that such coal be unloaded before delivery in Chicago and reweighed in order that the tare weight (the weight of the empty vehicle) may be obtained and set forth in a public weighmaster's certificate which is required by the ordinance to be delivered to the consignee *before the coal is delivered to the consignee from the vehicle.* This totally unnecessary rehandling of coal in transit from mine to consumer involves labor costs of $1.00 a ton and the grade of the coal is broken down by such unloading and, unless regraded, cannot be delivered without violating Section 3342 of the Chicago ordinances (unprinted record, p. 112) so that the practical effect of the reweighing requirements of the ordinance is that coal cannot legally be trucked direct from the mine to the consumer even though there are in existence, as is more specifically hereinafter pointed out, means of verifying the mine weights before delivery to the Chicago consumer which do not involve unloading and reloading the coal while in transit.

While the ordinances set forth above provide for the issuance of weighmaster's licenses to various persons operating scales in the City of Chicago, which persons are

designated as "public weighmasters," no means of regarding coal and no place for unloading the coal in transit are furnished by the City of Chicago and to obtain the weight of the empty vehicle each time and to regrade the coal after unloading it requires the establishment of a yard and tipple within the city limits of Chicago.

The ordinance in question was clearly designed to apply to resident dealers selling from their own yards and to permit them, if owning scales within the City of Chicago (as they must in order to operate such a coal business) to become licensed public weighmasters and appoint their own employes as their deputy weighmasters, so that the only burden imposed *by the ordinance* upon the operator of a coal yard in the City of Chicago is that of giving a $2,000 bond as a public weighmaster. This privilege of obtaining a weighmaster's license *is refused the non-resident mine or any dealer not operating a scale in the City of Chicago.*

Coal sold from Chicago coal yards is shipped by rail into the yard as "mine run" coal and is graded for the first time in the yard, at which time it is also for the first and only time weighed. In the case of the resident coal dealer delivering coal from his yard, *the ordinance requires no rehandling of the coal* after it is graded and weighed for sale to the consumer. The record here presented shows that the coal involved in this controversy was both graded and weighed at the mine (unprinted record, p. 51) as required by the State statute set forth above, but the appellant is convicted of violating the ordinance because he did not unload his coal and have it reweighed and regraded after entering the limits of the City of Chicago.

The Supreme Court of Illinois has held that in the instant case the ordinance complained of is to be construed as applying to the appellant's business. While the question of the construction of the State statute is finally deter-

mined by the decision of the Supreme Court of Illinois, yet whether or not the statute as construed is repugnant to the Federal Constitution is a question to be decided by the United States Supreme Court. See:

Price v. *Illinois,* 238 U. S. 446, 59 L. Ed. 1400;

Farmers Irrigation Dist. v. *Nebraska,* 244 U. S. 325, 61 L. Ed. 1168;

Hutchinson Ice Cream Co. v. *Iowa,* 242 U. S. 153, 61 L. Ed. 217;

Atchison, T. & S. F. v. *Vosburg,* 238 U. S. 56, 59 L. Ed. 1199;

In The Municipal Court of Chicago and in the Supreme Court of the State of Illinois, the appellant contended that if the ordinance were construed as applying to his business, it effectively prohibited such business because it required him to go into a totally different business, namely, that of delivering coal from a local coal yard. The decision of the majority of the Supreme Court of Illinois in effect holds that this result is incidental to the enforcement of the ordinance and that the appellant must abandon the lawful and legitimate business of trucking coal direct from mine to consumer. That such interference with a lawful and legitimate business is unconstitutional has been clearly decided by the Supreme Court of the United States in the case of *Louis K. Liggett Co.* v. *Baldrige,* 278 U. S. 105, 113, in the following language:

> "A State cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

As we contended in the court below and as stated in the dissenting opinion, a reasonable ordinance could and would provide for weighing the gross load and permitting the

delivery of the coal before requiring the trucker to weigh the empty truck to verify the tare weight shown on the delivery ticket issued at the mine. Another method of verifying such tare weight would be, as we also suggested in the court below, to stencil the tare weight of the vehicle on the truck. Neither of these methods of obtaining the tare weight is permitted under the present ordinances.

The City of Chicago has itself recognized by other sections of the same ordinance that the only reasonable method of verifying net and tare weights of a vehicle, which has previously been loaded and weighed, is by weighing the loaded vehicle first, permitting delivery of the commodity contained therein and then weighing the empty vehicle: Revised Chicago Code, Sections 2939, 2950, 2951, 3342 and 3445 (unprinted record, pp. 106, 108, 108-109, 112-113, 115).

The Chicago ordinances set forth above provide that a resident of Chicago having a scale within the city limits may weigh over his own scales coal which he sells from his own yard and may appoint his own employee as a deputy to do the weighing (unprinted record, p. 108). Allowing this privilege in one section of the ordinance eliminates, as to those eligible to be public weighmasters at the place where their coal is loaded, the burden of unloading and reloading the coal in transit, which is the burden imposed by Section 2947 as to all dealers who are not eligible to become public weighmasters at the point of original loading. The ordinance, therefore, does not interfere with the business of a coal dealer selling coal from a local yard. Manifestly the ordinance was intended to regulate that sort of business and was designed not to be unnecessarily harsh as to that method of doing business. However, *when applied to a totally different business,* namely, the business of selling coal trucked direct from the mine to the consumer, it imposes an unconscionable burden. If the mine owner were permitted by the ordinance to obtain a license as a public

weighmaster at the point of original loading in the same manner as a local coal dealer is privileged so to do, there could be no valid complaint against the operation of this ordinance. The vice of the situation is that the non-resident mine owner cannot have a weighing by a public weighmaster as compelled by the ordinance without re-handling the coal within the municipal limits of the City of Chicago. A case is thus presented in which a business totally different from that of selling coal from a yard in Chicago is subjected to the same burden of complying with the ordinance but is denied the same privilege of obtaining a weighmaster's license at the point at which the coal is weighed, graded and loaded in the truck for shipment to the consumer. An *equal burden* is thus added to an *unequal privilege*, resulting in gross inequality of treatment of two businesses which the Court below found are to be subjected to the same burden (of obtaining public weighmaster's weight certificates) and such gross inequality denies to the appellant the equal protection of the laws guaranteed to him by Section 1 of the Fourteenth Amendment to the Constitution of the United States and deprives him of liberty and property without due process of law, in violation of the same amendment.

The unreasonable and unequal burden imposed upon the appellant and those similarly situated, under the claim that it is an exercise of the police power, denies to this appellant the right to do a lawful and legitimate business with no corresponding benefit to the public; as stated by the dissenting justices, 363 Ill. 125, at page 136, 1 N. E. (2d) 396, at page 401:

> "It is quite as much in the interest of the public welfare that the people of the city of Chicago be afforded access to cheap markets for the necessities of life as it is that weights be watched. To so restrict access to

such market by putting such unnecessary expense on the purchaser is clearly unreasonable.

"It is likewise an unjust discrimination against large communities that happen to be so situated as to enable them to take coal from the ground cheaply and thus give a livelihood to thousands working in that business.

"It is well known that there are many sources of cheap coal within trucking distance of Chicago, and that by loading directly onto a truck at the mine and unloading directly into the consumer's bin, many handling charges are avoided. While such competition is clearly disadvantageous to Chicago coal dealers, it is certainly advantageous to the mine owners and those citizens of Chicago who wish to purchase this kind of coal. No one can doubt the legal right of these mine owners and consumers to deal directly with each other if they choose so to do, and, in our opinion, an ordinance which throws an artificial and unreasonable barrier across the path of this commerce, without any corresponding benefit to the health, morals, safety or welfare of the people, is void."

For all of the foregoing reasons, a substantial constitutional question is presented for decision in this case and an appeal lies as a matter of right from the judgment of the Supreme Court of the State of Illinois to the Supreme Court of the United States.

IRWIN T. GILRUTH,
THOMAS C. MCCONNELL,
OWEN RALL,
Attorneys for Appellant.

May 25, 1936.

FILE COPY

JUL 29

CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1936.

No. 175

MARCUS HAUGE,

Appellant,

vs.

CITY OF CHICAGO, a municipal corporation,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS; THERE HEARD ON APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

HONORABLE FRANK M. PADDEN, TRIAL JUDGE.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT.

IRWIN T. GILRUTH,
THOMAS C. MCCONNELL,
231 South La Salle Street,
Chicago, Illinois,

OWEN RALL,
135 South La Salle Street,
Chicago, Illinois,
Attorneys for Appellant.

CHICAGO LAW PRINTING CO., 111 N. WACKER DRIVE (COR. WASHINGTON ST.) TEL. FRANKLIN 6521

INDEX.

Subject Index.

	PAGE
Opinions Below	1
Jurisdictional Grounds	2
Scope of this Brief	2
The Case of City of Chicago v. Wisconsin Lime and Cement Co., Distinguished	2
Specification of Errors Relied On	4
I.	
The constitutionality of the ordinance under the Federal Constitution was raised in and decided by the Supreme Court of Illinois	5
II.	
The decision of the Supreme Court of Illinois was not based upon local law	8
III.	
A substantial Federal question is presented by this appeal	9
IV.	
The Federal question asserted by appellant is not foreclosed by previous decisions of this Court	26

PAGE

TABLE OF CASES CITED.

Adams v. Tanner, 244 U. S. 590 25

Atchison, T. & S. F. Ry. Co. v. Vosburg, 238 U. S. 56 11

City of Boston v. Jackson, 260 U. S. 309 10

City of Chicago v. Waters, 363 Ill. 125, 1 N. E. (2d) 396 1

City of Chicago v. Wisconsin Lime and Cement Co., 312 Ill. 520, 144 N. E. 3, 270 U. S. 626 ..... 2, 3, 4, 29

Corrigan v. Buckley, 271 U. S. 323 10

Deming v. Carlisle Packing Co., 226 U. S. 102 ..... 9, 11

Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 9, 11 25

International Steel & Iron Co. v. National Surety Co., 80 L. Ed. (Adv. Ops.) 585 6

Jay Burns Baking Co. v. Bryan, 264 U. S. 504 25

John P. King Mfg. v. City Council of Augusta, 277 U. S. 100, 72 L. ed. 801 9

Louisville and Nashville R. Co. v. Melton, 218 U. S. 36 23

May Coal & Grain Co. v. Kansas City, Mo., 10 Fed. Supp. 792 19

Meyer v. Nebraska, 262 U. S. 390 25

Merchants Exchange v. Missouri, 248 U. S. 365 27

Morehead v. New York, 80 L. ed. (Adv. Ops.) 921 13

Pierce v. Society of Sisters, 268 U. S. 510 25

Price v. Illinois, 238 U. S. 446 9

Quong Ham Wah Co. v. Industrial Commission, 255 U. S. 445 ..... 10, 13

Rogers v. County of Hennepin, 240 U. S. 184 5

Schmidinger v. City of Chicago, 226 U. S. 578 27

Weaver v. Palmer Bros. Co., 270 U. S. 402 25

Zucht v. King, 260 U. S. 174 10

PAGE

Statutes Cited.

Constitution of the State of Illinois, Article 2, Section 2 6
Constitution of the United States, 14th Amendment, Section 1 ..... 4, 5, 6, 7, 24
Revised Chicago Code of 1931, Section 2947 4
Revised Chicago Code of 1931, Section 2953 21
Revised Chicago Code of 1931, Section 3342 16
Rules of the Supreme Court of Illinois, Rule 39 (361 Ill. xix) 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1936.

No. 175

MARCUS HAUGE,

Appellant,

vs.

CITY OF CHICAGO, a municipal corporation,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS; THERE HEARD ON APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

HONORABLE FRANK M. PADDEN, TRIAL JUDGE.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT.

MAY IT PLEASE THE COURT:

Opinions Below.

The majority and minority opinions in this case in the Court below are reported, *City of Chicago* v. *Waters*, 363 Ill. 125, 1 N. E. (2d) 396.

Jurisdictional Grounds.

A jurisdictional statement has been filed by appellant. The grounds on which the jurisdiction of this Court are invoked will not be repeated here.

Scope of this Brief.

This brief in opposition to the appellee's alternative motions to dismiss or affirm filed with the appellee's statement opposing jurisdiction is a supplement to the appellant's jurisdictional statement and will so far as possible avoid a repetition of matters contained in such jurisdictional statement. In the present brief we shall follow the order of the contentions made by appellee in its statement opposing jurisdiction.

The case of City of Chicago v. *Wisconsin Lime and Cement Co. distinguished.*

The appellee states that the Chicago ordinance involved here was sustained in *City of Chicago* v. *Wisconsin Lime and Cement Co.*, 312 Ill. 520, 144 N. E. 3, and that a writ of error to review that judgment was dismissed for want of jurisdiction. The defendant in that case (270 U. S. 626) did not in the Supreme Court of Illinois challenge the ordinance as being invalid under the 14th Amendment and accordingly the Supreme Court of Illinois did not pass upon such a contention. Therefore, the action of this Court in dismissing that case was based upon the fact that the Federal question was not raised below, and was not based upon the appellee's present contention that the Federal question concededly raised below in the present case is not substantial.

The Supreme Court of Illinois in the instant case held that *City of Chicago* v. *Wisconsin Lime and Cement Co.*, 312 Ill. 520, is not controlling in any respect in the decision of the questions raised here. Both the majority and the dissenting judges agreed on that. The majority opinion, after setting forth the contentions of the appellant, among them that the ordinance violates the Federal constitution, states:

> "This issue is one of first impression in this court, and we are not referred by either side to any decision where the precise question presented has been decided. * * * The power of the city to adopt the particular ordinance before us, together with its reasonableness, and that it was not subject to attack as making a classification obnoxious to the constitutional provision, was definitely decided in the *City of Chicago* v. *Wisconsin Lime and Cement Co.*, 312 Ill. 520. The attack here made on the validity and constitutionality of the ordinance is not the same, however, as was decided in that case."

The minority opinion states:

> "The argument that the case of *Wisconsin Lime and Cement Co.* v. *City of Chicago*, 312 Ill. 520, is controlling here, is not impressive. This ordinance was there held to be reasonable as applied to coal dealers operating within the city of Chicago, on the ground that it was, 'liberal in permitting the dealers themselves to be appointed deputies for their own convenience.' Here the record shows that the complaining mining companies cannot obtain weighmasters certificates, thus effectually shutting out of the markets of the city of Chicago a commodity that the people have a right to buy."

The holding by the Illinois Supreme Court in the *Wisconsin Lime and Cement Co.* case, that this ordinance was constitutional under the state constitution when applied to the business of operating a local coal yard, has no bearing upon its validity under the Federal constitution when applied to the totally different situation presented by the record in this case.

Specification of Errors Relied On.

1. The Supreme Court of Illinois erred in holding that Section 2947 of the Revised Chicago Code of 1931 is not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Illinois erred in holding that said Section does not deny to the appellant the equal protection of the laws guaranteed to the appellant by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of Illinois erred in holding that said Section does not deprive the appellant of liberty and property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of Illinois erred in affirming the judgment of The Municipal Court of Chicago.

I.

The constitutionality of the ordinance under the Federal Constitution was raised in and decided by the Supreme Court of Illinois.

Appellee first contends that the Supreme Court of Illinois would have been justified in ignoring the appellant's contention that the ordinance involved here violates the 14th Amendment and that therefore the decision of that question was "unnecessary" to that court's decision. If that court had declined to pass upon the appellant's contention that the ordinance violates the Federal constitution, then it would be necessary for us in order to sustain the jurisdiction of this Court on this appeal to show that the question was seasonably presented to the Illinois Supreme Court. Such is the purport of the cases cited by the appellee under Point I of its opposing jurisdictional statement. The Illinois court did not decline to pass upon the appellant's contention that the ordinance violates the Federal constitution, but treated it as properly raised under the practice there prevailing (which, in fact, it was) and expressly decided the constitutional issue presented to it. What the court might have done is of no importance here. The question here is settled by what the court actually did.

In *Rogers* v. *County of Hennepin*, 240 U. S. 184, at pp. 188-189, this Court held, per Mr. Justice Hughes, that where the state court does not decide against the appellant on an independent state ground but, deeming the Federal question to be before it, actually decides it adversely to the Federal right asserted, this Court has jurisdiction.

In Appellant's Jurisdictional Statement we set forth "the errors relied on" by the appellant in the Supreme Court of Illinois. By rule 39 of that Court (361 Ill. xix), such errors take the place of assignments of error attached to the record, formerly required in that state but now abolished. The errors so quoted specifically challenged the constitutionality of the ordinance under the Federal, as distinguished from the state constitution and appellant argued throughout his briefs that the ordinance was unreasonable in that it imposed an unnecessary and arbitrary restriction upon a lawful and legitimate business, namely, the business of trucking coal direct from the mine to the consumer. Such an argument supported appellant's contention that the ordinance violated the Fourteenth Amendment.

That the appellant's contention was clear to the Supreme Court of Illinois and was decided by it is shown by the majority opinion which stated in part:

> "It is here urged that by reason of these requirements, as applied to the defendants, the ordinance is unreasonable, deprives the defendants of the equal protection of the law and deprives them of liberty and due process of law in violation of Section 1 of the Fourteenth Amendment to the Federal constitution and of section 2 of article 2 of the Illinois constitution."

After stating its reasons therefor, the court then said:

> "The ordinance is not unreasonable and is not susceptible to the charges lodged against it of being a violation of the State and Federal constitutions."

In the recent case of *International Steel & Iron Co.* v. *National Surety Co.*, 80 L. ed. (Adv. Ops.) 585, at p. 588, this Court said:

> "Counsel for the appellant requested at the bar a continuance of the cause to afford opportunity for

amplification of the record disclosing the basis of decision. The application was granted, a petition was filed in the court below, and, in response thereto, the court added to its opinion a recital that a reargument had been ordered upon 'the constitutionality, construction, and applicability' of Chapter 80 of the Acts of 1929, and, prior to reargument, counsel for the appellant had filed a brief raising the federal constitutional question under Article 1, § 10, and the Court intended to express the opinion that the Act, as construed by it, 'did not impair the obligation of contracts in violation of * * * the contract clause of * * * the Constitution of the United States.' These additional proceedings have been certified and added to the record. Upon the record as thus supplemented we have jurisdiction."

This decision we submit is conclusive of the question raised here because the statement of the Illinois Supreme Court in its opinion is fully as strong as the recital added to the opinion by the state court in the above case.

The appellee argues under Point I that the judgment rendered in this case "could have been given without deciding that the ordinance did not violate the Fourteenth Amendment." On the contrary, it is self evident that the court could not sustain a judgment based on the ordinance, as it did, without holding that the ordinance did not violate the 14th Amendment, because the validity of the ordinance had been expressly challenged on that ground. That two charges were lodged against this ordinance, one under the State constitution and the other under the Federal constitution, is unimportant because the charges were independent of each other. If either charge was sustained the ordinance was invalid. By holding the ordinance valid,

the court overruled both charges. The validity of the ordinance was thus "drawn in question" "on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity", so that under Sec. 237(a) of the Judicial Code as amended February 13, 1925 (Chap. 229, 43 Stat. 936) this Court has jurisdiction of this appeal.

The appellee's further contention that the errors assigned in this Court are too indefinite to raise the constitutional questions here asserted is best answered by reading the first three errors assigned.

II.

The decision of the Supreme Court of Illinois was not based upon local law.

In Point II of its opposing jurisdictional statement, the appellee admits that one of the points "necessary to a decision of the case" by the court below was "(2) The validity of the ordinance." As we have shown above, the decision of this question required a decision of the Federal question here discussed, because, as pointed out, the ordinance was attacked as unconstitutional under both the State and the Federal constitutions.

We have no quarrel with the decisions cited under Point II of appellee's jurisdictional statement. While the appellee states broadly that the question of the validity of a municipal ordinance is a question of local law and will not be reviewed by the Supreme Court of the United States, it should be pointed out that the cases cited by it hold this statement to be true only when the question is whether a State constitution, as distinguished from the Federal constitution, is violated by an ordinance.

We are not asking this Court to review the decision of the Supreme Court of Illinois in so far as it construes the meaning of the ordinance and in so far as it holds that the ordinance is valid under the Illinois constitution. But the question whether the ordinance violates the Federal constitution is one to be determined finally by the Supreme Court of the United States and is clearly not a question of local law: *John P. King Mfg. Co.* v. *City Council of Augusta*, 277 U. S. 100, 72 L. ed. 801; *Price* v. *Illinois*, 238 U. S. 446.

III.

A substantial Federal question is presented by this appeal.

The record is clear and uncontradicted that the ordinance in question bars this appellant from engaging in a useful, necessary and legitimate business, namely, the trucking of coal direct from mine to consumer, which business results in large savings to the consuming public. Our complaint against this result is declared by appellee to raise an unsubstantial Federal question. This court has said that to sustain this contention, the appellee must show that the asserted invalidity of the ordinance here involved "is devoid of merit and unsubstantial, either because concluded by previous authority, or because of its absolutely frivolous nature." (*Deming* v. *Carlisle Packing Co.*, 226 U. S. 102.)

Following the sequence of appellee's argument, we shall show under Point IV, below, that the present question is not concluded by previous authority, and shall discuss here the point whether the Federal question asserted by appellant is "absolutely frivolous."

The question is whether in view of previous decisions the questions presented by the appellant "are so wanting

in substance as not to need further argument," (*City of Boston* v. *Jackson*, 260 U. S. 309). The fact that appellee devotes thirteen typewritten pages to an argument intended to prove that appellant's contention is not arguable is itself strong refutation of its contention.

The cases cited by appellee under its Point III, apart from their statements of the well-accepted general rules governing motions to dismiss or affirm, are not applicable to the record in the instant case. They are clearly distinguishable.

In *Zucht* v. *King*, 260 U. S. 174, every separate contention made by the plaintiff in error in support of his writ had been determined adversely by previous decisions of this Court. The one Federal question which this Court found to be substantial—the charge that there was unconstitutional discrimination by officials in the enforcement of a constitutional ordinance—was not ground for a writ of error under the Judicial Code, so the writ was dismissed.

In *Corrigan* v. *Buckley*, 271 U. S. 323, no statute or ordinance whatever was involved, the question at issue concerned private contracts which were not ground of any jurisdiction of this Court, and under those circumstances the Court dismissed the appeal as "plainly without merit and frivolous."

In *Quong Ham Wah Co.* v. *Industrial Commission*, 255 U. S. 445, the state court construed a state statute as applying alike to citizens and non-citizens of the state and the plaintiff in error's complaint that the statute unconstitutionally discriminated between those two classes would have required this Court to overturn the state court's construction of the statute before there would have been the slightest semblance of a constitutional question to be

argued here by the plaintiff in error. This Court's acceptance of the interpretation placed on the state statute by the state court eliminated all constitutional ground of plaintiff in error's complaint and this Court dismissed the writ of error.

In *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, the Court held that a state court's refusal to permit the removal of a case to the Federal court which plainly was not removable did not raise a substantial Federal question, that the writ of error in that case was sued out for delay, and that it should be dismissed with damages for delay.

The City of Chicago seeks here to avoid a review on the merits of the judgment of the Supreme Court of Illinois by its assertion that the ordinance involved is within the police power of the State of Illinois and by ignoring the limitations on the exercise of that power. Appellant freely concedes that the prevention of short weights is a laudable purpose but asserts, with the authority of every decision of this Court that has ever dealt with the question, that the method used must be non-discriminatory and reasonable to constitute a constitutional exercise of such power.

Whether the ordinance involved here is *non-discriminatory and is reasonable* is, to say the least, highly arguable (as indicated by the fact, alone, that two of the seven judges below dissented) and, therefore, presents a question which can only be determined by reviewing the cause on the merits. Certainly appellant's contentions are neither "absolutely frivolous" nor so plainly without merit as "not to need further argument."

This Court said in *Atchison, T. & S. F. Ry. Co.* v. *Vosburg*, 238 U. S. 56, at page 59:

> "But we cannot at all agree that a police regulation is not, like any other law, subject to the 'equal protection' clause of the 14th Amendment. Nothing to that effect was held or intimated in any of the cases referred to. The constitutional guaranty entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws, in this as in other departments of legislation."

The vice of the ordinance complained of is that the appellant and others engaged in the business of trucking coal from mine to consumer are required by it to dump the load en route in order to permit a public weighmaster to procure the tare weight of the vehicle *before delivery.* This burden is not imposed upon a person owning a Chicago coal yard because he may himself act as his own public weighmaster at the point of original loading. Recognizing the substantial character of appellant's complaint, the City of Chicago—after acting to the contrary in its administration of the ordinance for many years and after contending to the contrary in both courts below—now seeks to evade the issue of whether the unloading requirement as applied to persons in appellant's situation is unconstitutional by saying:

> "This [the ordinance] leaves the manner and time of ascertaining the tare weight to the public weighmaster and the provision is by no means so drastic as appellant's counsel or the dissenting justices state."

Significantly, appellee does not intimate any other method of complying with the ordinance than by unloading and reloading the truck before delivery; on the contrary it ridicules every other method which is advanced by the

dissenting judges or by the appellant as a reasonable method of getting honest weights.

As pointed out below, the Illinois Supreme Court has construed this ordinance as requiring the rehandling now recognized as "drastic" and has decided the case on a construction which directs the so-called public weighmaster to require this rehandling as a condition to issuing a weighmaster's certificate.

Since all weighmasters in Chicago are competitors of the appellant it is childish to assert that they would give any different construction to the ordinance than that impressed upon it by the Supreme Court of Illinois. Such construction is binding upon this Court in its determination of the constitutionality of the ordinance. (*Quong Ham Wah Co.* v. *Industrial Commission*, 255 U. S. 445; *Morehead* v. *New York*, 80 L. ed. (Adv. Ops.) 921.)

Further appellee's counsel says:

> "Of course to give value to the weight certificate it must contain true net weight, and in order to be able to state the net weight it is incumbent upon the public weighmaster to ascertain the gross and tare weights."

Since the tare weight is the weight of the empty vehicle and the tare weight must be on the weight certificate *before the coal is delivered*, counsel, in fairness to the Court, should point out how this tare weight can be obtained without dumping the load.

Had the Supreme Court of Illinois construed the ordinance as not requiring appellant to unload and reload his coal en route to the consumer, the ordinance as thus construed would be reasonable, the complaint in the court below would have been obviated, and appellant would not now

be appealing to this Court. However, it determined that it is necessary to dump and reweigh the load in order to get a weighmaster's certificate. It said:

> "It is more convenient, and doubtless less expensive, for the particular dealer to weigh his truck, both empty and loaded, on the public weighmaster's scale at Morris. *This, however, is not a compliance with the ordinance.* The defendants claim it is unreasonable to require them to unload their trucks after entering Chicago, weigh the truck empty and then reload and make delivery, and that the coal is always damaged and that there is always a loss of coal occasioned by the unloading and reloading." (Italics ours.)

Further on in its opinion the Court said of appellants:

> "They have merely elected to do their business in a manner more convenient to them and different from the method prescribed by the ordinance."

Mr. Chief Justice Stone of the Illinois Supreme Court and Mr. Justice Shaw, dissenting, recognized the vice inherent in the ordinance and said:

> "It is clearly unreasonable to require that a load of coal coming into Chicago be unloaded, the truck weighed, then the coal re-loaded and weighed again. This extra and useless handling charge can inure only to the benefit of local dealers and it can only result in penalizing the consumer and the outside producer."

It is, therefore, clear that in both the majority and minority opinions the Court construed the ordinance as requiring a reweighing involving a rehandling of the coal in the City of Chicago. This is in conformity with the previous contentions of the appellee and with its methods

of administering the ordinance for many years, and the contrary suggestion is merely a tardy admission that the requirement that the load be rehandled is "drastic" and unreasonable.

The further suggestion now made by the appellee that there is nothing to prevent a downstate coal company from establishing an agent in Chicago as a public weighmaster does not ameliorate the unnecessary burden imposed by the ordinance on the appellant. So long as it is necessary in order to comply with the ordinance to unload and reload the coal in the City of Chicago, the establishment of an agent qualified to act as a weighmaster *inside the city limits* does not cure the vice of the ordinance as applied to those in the business of shipping coal by truck directly from mine to consumer, for if they have to unload their trucks to comply with the ordinance it makes little difference to them whether their agent or some other person does the slight physical acts of balancing the beam and reading and certifying the weights.

The appellee's statements that the ordinance can be complied with by any legitimate dealer or trucker and that the cost of a public weighmaster's certificate is but 25 cents fall into the same category. It is not the amount of the weighmaster's fee which is objectionable, but the whole unnecessary and burdensome procedure which must accompany the weighing by the public weighmaster in order to obtain a certificate at all.

The suggestion of the dissenting justices that a weighing of the empty truck might just as well take place after delivery as before is ridiculed by the appellee in Point III of its opposing jurisdictional statement. And yet an ordinance of the City of Chicago dealing specifically with

coal provides (Section 3342, Revised Chicago Code of 1931, Abstract in Supreme Court of Illinois, pp. 44-45):

> "Every such person, firm or corporation shall, on demand of the inspector of weights and measures of the city of Chicago, or any of his deputies, or the purchaser or intending purchaser or his agent or representative, or the person to whom the delivery is to be made, produce and deliver said [delivery] ticket or tickets to said officer or to his deputies, or to the purchaser or intending purchaser, or his agent or representative, or to the person to whom delivery is to be made, and whenever said officer or any of his deputies, or the purchaser or intending purchaser, or his agent or representative, or the person to whom delivery is to be made, shall demand that the said weights shown by said ticket or tickets be verified, it shall thereupon become the duty of the person, firm or corporation delivering such fuel to convey the same forthwith to some public scale selected by the inspector of weights and measures of the City of Chicago, or any of his deputies, or the purchaser or intending purchaser of the fuel being delivered, or his agent or representative, or the person to whom delivery is to be made, in the particular locality where the solid fuel is to be delivered, or to any private scale in the particular locality where the owner thereof shall consent to such use, and permit the weighing of the solid fuel, together with conveyance and equipment, for the purpose of ascertaining the gross weight thereof, and shall, after the delivery of such fuel, return forthwith with the conveyance and equipment used in the delivery of such solid fuel to the same scale and permit the weighing of said conveyance and equipment for the purpose of verifying the net weight of the solid fuel, as shown by the said ticket or tickets; * * *."

This ordinance, as amended May 18, 1934, deals specifically with coal, the subject matter involved in this controversy. It is clear from this section that when the city council of the City of Chicago dealt specifically with coal as distinguished from other commodities it recognized as a fact that weighing the vehicle after delivering the coal to the consumer is the only *reasonable* method of obtaining the tare weight of a loaded vehicle in rechecking a previous weighing. It is also clear from this section of the ordinance that the suggestion of the minority justices is not subject to ridicule but manifests a clear understanding of the problems involved in checking a weight already once legally determined.

Any objection that certification of the tare weight after delivery of the coal would not sufficiently protect the customer can easily be obviated by a provision in the ordinance that the customer *shall not be required to pay for the coal* until a weighmaster's certificate is presented showing gross, tare and net weights duly certified. The trucker could have the gross weight certified, dump the coal at the customer's location, and then return to the same weighmaster for certification of the tare and net weights. Only after presentation of such completed certificate would the customer be obliged to pay for the coal. The above procedure would be simple in operation and would afford to the customer the identical protection which he now receives by the requirement that the tare weight must be ascertained *before delivery* by the onerous method of dumping and reloading the coal. The procedure suggested would enable the appellant and others similarly situated to comply with regulations which would adequately protect the public but which would not arbitrarily and unnecessarily deprive them of their business.

We stated in our jurisdictional statement that sustaining the validity of this ordinance meant the destruction of a useful and necessary and legitimate business. While appellee's counsel characterize this statement as absurd the dissenting justices did not so consider it, because they stated that the ordinance

> "shows on its face that it is cleverly designed for the purpose of conferring a monopoly in the coal business upon dealers residing within the city of Chicago, to the exclusion of other citizens residing outside of that city who have an entirely lawful right to sell to persons who live within the corporate limits."

They further said of this ordinance:

> "It is likewise an unjust discrimination against large communities that happen to be so situated as to enable them to take coal from the ground cheaply and thus give a livelihood to thousands working in that business."

The duly elected State's Attorney of Grundy County and other officials in the coal district in the Illinois River Valley filed an intervening petition as *amici curiae* in the Supreme Court after the decision of the cause and set forth in their affidavit that:

> "The effect of this decision will be to close the mines located in the Illinois River Valley, many of which are not adjacent to any rail, switch or spur connections, and that depriving these mines of the right to truck coal will deprive them of their market for their produce. And that approximately Two Thousand (2,000) families in Grundy County alone are dependent upon the mines affected by this decision for their livelihood."

The majority opinion of the Illinois Supreme Court holds that if truckers have to establish coal yards in the City of Chicago to comply with this ordinance this is "incidental." In other words, the court has said in effect that the City of Chicago may by indirect means provide that no one can sell coal in Chicago unless he establishes a coal yard within the territorial limits of such city.

An ordinance which directly requires a coal yard to be established as a condition precedent to doing a coal business has been held unconstitutional in the case of *May Coal & Grain Co.* v. *Kansas City, Mo.*, 10 Fed. Supp. 792. In that case the city was enjoined from enforcing an ordinance which required all retail coal dealers in Kansas City to "possess and own proper equipment for the operation of such retail business within the limits of the city; such equipment shall consist of a coal yard or station with reasonable facilities therefor, an office and wagon scale of at least five tons capacity."

The Court said:

> "The enforcement of the ordinance against the plaintiff has destroyed that business or will do so unless the city is enjoined from such enforcement. This would result in depriving it of 'property without due process of law' within the first section of the 14th Amendment to the National Constitution.
>
> "The city would have no right to do this unless it was essential to protect the residents of the city against imposition. * * *
>
> "To the extent that the ordinance required an established place within the city, it was unreasonable and thus deprived plaintiff of its property without due process of law."

Appellee's counsel further say under Point III.

> "To a greater degree the user needs protection when coal is delivered to him by irresponsible, itinerant, part-time truckers using a miscellaneous lot of vehicles instead of regular coal trucks, from a mine 62 miles from Chicago."

However, if the "itinerant, irresponsible, part-time" trucker buys his coal from a Chicago coal yard he is supplied with a weighmaster's certificate and the ordinance in no way regulates him or his business. It is only when the mine owner or dealer or the trucker attempts to save rehandling charges in the City of Chicago that the City becomes concerned about whether or not he is "itinerant, irresponsible, or part-time." On its face this ordinance does not concern itself with the question of who should be in the coal business. It is not ostensibly designed for any other purpose than checking weights and measures.

We contend that this result can be obtained by a reasonable ordinance, but that the regulation *must be reasonable*, and no case is cited by the appellee which in any way denies that proposition. The Supreme Court of Illinois in the decision complained of has decided the matter by saying in effect *that the trucker cannot engage in his present business at all*—he must establish a coal yard where he can dump and reload his coal. He must go into an entirely different business, that is, the operation of a coal yard. This solution neither meets nor answers the question presented. It is because the Supreme Court of Illinois has said that the only way this appellant can comply with this ordinance *is to go out of business* that we here present a substantial Federal constitutional question for review. Any ordinance which deals with the problem in

such drastic and ruthless fashion can, we submit, have no presumptions indulged in its favor.

The weakness of the appellee's position is further disclosed when its counsel says that the reason this ordinance is necessary is because:

> "Furthermore, on the long haul to Chicago, perhaps a night haul, a portion of the load may be lost, some of it may be bartered for gasoline en route, and there is no assurance that the customer would receive the quantity weighed at the mine."

There are 3631 miles of streets and 912 miles of paved alleys within the City of Chicago. It is obvious, therefore, that a dishonest driver can obtain inside the City of Chicago a weight certificate required by this ordinance and then before delivery drive up any of these streets and alleys and do all or any of the things to cheat his customer that are suggested by appellee's counsel. *This ordinance has no effect whatever in preventing dishonesty after the original weighing.* The only ordinance which deals with that question is one imposing penalties for short weight (Section 2953, Revised Chicago Code of 1931, Abstract of Record, Illinois Supreme Court, pp. 41-42) concerning which this appellant has no complaint.

If, as appellee contends, the distance from mine to consumer justifies a rechecking of weights within the city limits of Chicago, still that does not justify the appellee in imposing a requirement *that can only be satisfied by unloading all coal within the limits of the City of Chicago,* when other equally effective methods are available which do not impose any such burden. We submit that the suggested method of verifying the mine weights without unloading and reloading the coal before delivery, together

with the provisions of valid, existing ordinances punishing the delivery of short weights, would be more than adequate to protect the purchaser against short weight and would afford him ample opportunity to determine before he takes delivery and pays his money whether or not he is in any manner imposed upon. If upon weighing the loaded vehicle, the gross weight, that is, the weight of the coal plus the vehicle, coincides with the gross weight as shown by the mine delivery ticket obtained by the previous weighing over state-inspected scales, it would be highly improbable that the net weight of the coal would have varied on the trip between the mine and Chicago more than the 1% allowed by the Chicago ordinance.

The real motive for excluding the appellant from the Chicago market is disclosed in the appellee's statement that, "if the ordinance were not enforceable, then the retail coal industry of Chicago would be demoralized by unfair and unethical competition."

Since the only time the City becomes concerned about this competition is when it results in a saving of a handling charge *of a dollar a ton to the consumers of the coal*, it must be patently clear that the City of Chicago is really trying to protect its local coal dealers from lawful, legitimate competition resulting from a more efficient method of doing business and that it is trying to accomplish this under the guise of protecting the public from short weight. When the City expresses concern for the retail coal industry within the City of Chicago it thereby discloses that this whole matter has a competitive origin and that the consuming public is to be penalized by being required to pay unnecessary handling charges exacted in the name of the police power.

If this ordinance were an honest, straight-forward enactment for the purpose of protecting the consumer, then we submit that it would require merely a reasonable method of checking *the legal weights certified at the mine*. The City of Chicago, if it were honestly enforcing the ordinance, would be just as concerned that the inherent saving involved in transporting coal direct from mine to consumer be passed on to the consuming public as are the dealers, miners and truckers engaged in the business. Protection of the public against short weights is to protect the public against paying excessive prices for what it buys. Prohibiting the economies which obtain in trucking coal directly from mine to consumer is manifestly contrary to the public welfare. Every argument of appellee in favor of protecting the public's purse against short weights is an argument against the unnecessary and expensive unloading and reloading of coal which the City of Chicago now requires under the guise of protecting the public's purse.

As the minority opinion stated:

> "It is quite as much in the interest of the public welfare that the people of the city of Chicago be afforded access to cheap markets for the necessities of life as it is that weights be watched. To so restrict access to such market by putting such unreasonable expense on the purchaser is clearly unreasonable."

The cases cited by the City of Chicago in support of its contentions under this heading are clearly distinguishable, as we have already pointed out. Much closer in point is *Louisville and Nashville R. Co.* v. *Melton*, 218 U. S. 36. There a motion was made to dismiss a writ of error sued out by the defendant railroad company which had unsuccessfully contended in the state court that a state statute

violated the 14th Amendment. Two judges of the court below (as here) had dissented.

This Court by Mr. Justice White said, (p. 49):

> "We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous."

The further reasoning of the Court in that case is applicable to the present case, (a) because the present case requires analysis to determine whether prior decisions are decisive of the issue here presented, (b) because the division of opinion of the court below "suggests that the controversy here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below," and (c) because the majority of the court below considered the matter to be one of first impression and appellee's counsel have been unable to name a single case of this Court, or of any court other than the court below, holding a requirement of the kind here complained of to be valid and constitutional.

While the power to enact a reasonable ordinance which regulates methods of weighing coal or other commodities sold in load lots is within the police power of the state, this power is subject to the definite limitation that the State cannot under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them:

Jay Burns Baking Co. v. *Bryan*, 264 U. S. 504, 513;
Meyer v. *Nebraska*, 262 U. S. 390, 399, 400;
Pierce v. *Society of Sisters*, 268 U. S. 510, 534, 535;
Weaver v. *Palmer Bros. Co.*, 270 U. S. 402, 412, 415;
Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1, 9, 11.

In *Adams* v. *Tanner*, 244 U. S. 590, this Court said, (pp. 594-595):

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. * * * Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

Certainly this appellant has a right to a determination of whether or not *it is necessary to bar him from business*

in order to protect the public. Certainly, the public has a right to a determination of whether it must pay $1.00 a ton more for its coal in order to gain protection from short weighing, when, as pointed out, the ordinance neither prevents it nor aids in the enforcement of other valid provisions of the ordinance which do prevent it. Certainly the truckers and miners have a right to know whether they can be constitutionally forbidden a weighmaster's license because they are non-residents or merely at the whim of the Mayor of the City of Chicago.

We submit this appellant has advanced a substantial constitutional question for the determination of this Court.

IV.

The Federal question asserted by appellant is not foreclosed by previous decisions of this Court.

The Court below held that the question here presented was one of first impression. Appellee contends, nevertheless, that the question is foreclosed by previous decisions of this Court, yet it points to no decision of this Court sustaining an ordinance which imposes the requirement imposed by this ordinance. It argues from analogy and from general rules, but even if such argument were successful, it would not satisfy the appellee's burden of proving that the question here presented has been decided, or is so plainly without merit as not even to be arguable.

In every instance the validity of an ordinance depends upon whether the ordinance is in fact and in law a reasonable and necessary exercise of the police power. On different statutes and different facts this Court has decided differently. In none of the cases cited by the appellee are the

very definite limitations on the exercise of the police power denied.

The cases cited by counsel for the appellee to sustain their contentions under this heading are clearly distinguishable on their facts. Thus:

In the case of *Schmidinger* v. *City of Chicago*, 226 U. S. 578, said to control the decisions of the instant case, the holding was only that the fixing of the weight of a loaf of bread was not an unnecessary or arbitrary exercise of the police power. This Court, however, did not refuse to pass upon that question.

The case of *Merchants Exchange* v. *Missouri*, 248 U. S. 365, is distinguishable on its facts. Under the state statute there involved, public weighmasters were appointed by the state and the warehousemen themselves were forbidden to issue certificates of weights in cities where such weighmasters were appointed. In the instant case, the local coal dealers operating coal yards in the City of Chicago are appointed weighmasters and do the weighing themselves. The non-resident trucker or mine operator must take his coal into his competitor's yard, dump it and then reweigh it. Assuming that this can be done without objection or hindrance from the local coal dealer the rehandling charge of $1.00 a ton effectively imposes an embargo on down-state coal, to avoid which the trucker or mine operator must go into a totally different business, namely; operating a coal yard of his own in the City of Chicago.

In the *Merchants Exchange case, supra,* this Court, prior to holding the ordinance valid held it was not an unreasonable or arbitrary exercise of the discretion vested in the legislature. By this finding the Court recognized the limitation on the power of the state or city to enact such

legislation, which we have asserted here, namely, that such legislation must be reasonable and necessary. This question, we submit, cannot be determined in the instant case without a hearing on the merits.

In Point IV of its opposing statement, appellee repeats its assertion that "the ordinance does not call for any unloading or rehandling of coal." The Supreme Court of Illinois holds that it does and the appellee has always so contended. The case is presented here on that construction of the ordinance. The present insistence of the appellee that the ordinance does not require an unloading en route from mine to consumer is, we submit, an admission that such a requirement is invalid.

In our original jurisdictional statement we pointed out the discrimination between dealers owning scales and loading their coal within the City of Chicago and those owning scales and loading their coal outside of the City. Both are held by the court below to be subject to the same requirement of obtaining a public weighmaster's certificate, yet only the first group is permitted to become public weighmasters.

The appellee answers that it would be absurd to permit a mine owner located 62 miles beyond the city's limits to obtain a public weighmaster's license. Yet, in cases of milk inspection, city inspectors must and do go beyond city boundaries to inspect the dairies of those who seek to sell milk within the city, and certainly it would be unconstitutional to prevent the sale of milk without inspection and then to refuse to make an inspection.

An important thing to be considered here, in determining whether the ordinance is reasonable as to a person bringing coal in from outside the City of Chicago by truck, is that the means of satisfying the requirements of the ordi-

nance which are given the local dealer by permitting him to become a public weighmaster are not available to the non-resident miner or trucker at the place where such means would enable them similarly to satisfy the requirements of the ordinance, *i. e.*, at the point at which transportation to the consumer originates.

The issue here is not and never has been one between the present ordinance on one hand and the absence of all regulation of appellant and those similarly situated on the other hand, but the issue is between the unreasonable regulation imposed on appellant by this ordinance and some reasonable ordinance which the appellee has ample power to enact. In the *Wisconsin Lime and Cement Co.* v. *City of Chicago* case, 312 Ill. 520, the inherent differences between different methods of selling coal were recognized, the Illinois Supreme Court saying, (p. 524):

> "A wholesale dealer selling in car-load lots is not in the same class as the dealers included in the ordinance."

By the same token, it must be apparent that a dealer selling coal from a mine direct to a consumer is not in the same class as a dealer selling from a local coal yard. In the first case, the only legitimate public interest is a check in some reasonable manner upon the mine weights. As is stated by the minority opinion below, requiring a rehandling of the coal is not necessary to obtain this result. *Since unnecessary, the requirement here complained of must, as a logical necessity, be held unreasonable.*

We have pointed out that questions of large public interest are involved in this appeal and that a substantial question is presented. We submit that the motion of the

appellee to dismiss or affirm should be denied and that upon the hearing on the merits the decision of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

IRWIN T. GILRUTH,
THOMAS C. MCCONNELL,
OWEN RALL,
Attorneys for Appellant.

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 14 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 175

MARCUS HAUGE,

Appellant,

vs.

THE CITY OF CHICAGO,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

Brief and Argument for Appellant.

THOMAS C. MCCONNELL,
IRWIN T. GILRUTH,
231 South La Salle Street,
Chicago, Illinois.

OWEN RALL,
135 South La Salle Street,
Chicago, Illinois
Counsel for Appellant.

CHICAGO LAW PRINTING CO., 111 N. WACKER DRIVE (COR. WASHINGTON ST.) TEL. FRANKLIN 6321

INDEX.

SUBJECT INDEX.

	PAGE
Official Report of Case	1
Jurisdiction of this Court	2
Statement of the Case	2
Specification of Errors	13
Summary of Argument	14
Argument	16

I.

The requirement in the ordinance complained of that coal in transit by truck from mine to consumer must be dumped in order to get the tare weight of the empty vehicle is an unnecessary and unreasonable restriction on a legitimate business, and is therefore unconstitutional and void under Section 1 of the Fourteenth Amendment to the Constitution of the United States 16

II.

The appellant seeks no discrimination in his favor but only a reasonable manner of checking mine weights which does not nullify the saving to the consumer by reason of his more efficient method of doing business 26

III.

When this ordinance is applied to appellant's business it does discriminate against such business contrary to the Fourteenth Amendment of the Constitution of the United States 32

PAGE

Table of Cases Cited.

City of Chicago v. Kautz, 313 Ill. 196 ..... 19, 32
City of Chicago v. Waters, 363 Ill. 125, 1 N. E. (2d) 396 1
City of Chicago v. Wisconsin Lime & Cement Co., 312 Ill. 520 ..... 11, 12, 27
Dobbins v. City of Los Angeles, 195 U. S. 223 17
Fairmont Creamery Co. v. Minnesota, 274 U. S. 1 17
Hill v. Fetheroff, 236 Pa. 70, 80 Atl. 677 37
Jay Burns Baking Co. v. Bryan, 264 U. S. 504 17
Louis K. Liggett Co. v. Baldrige, 278 U. S. 105 24
May Grain & Coal Co. v. Kansas City, Mo., 10 Fed. Supp. 792 25
Pierce v. Society of Sisters, 268 U. S. 510 17
State v. Nelson, 66 Minn. 166, 68 N. W. 1066 ..... 36, 37
Weaver v. Palmer Bros. Co., 270 U. S. 402 17

Statutes Cited.

Constitution of the United States, 14th Amendment, Section 1 ..... 4, 11, 13, 14, 15, 16, 25, 26, 38
Illinois State Bar Stats. (1935) c. 147, par. 20 4
Illinois State Bar Stats. (1935) c. 147, par. 39 8
Revised Chicago Code of 1931, Section 2939 21
2947 ..... 2, 7, 10, 13, 16
2950 21
2951 21
2955 5
3612 5
3613 5
3614 5
3616 5
3617 5
3623 ..... 3, 5, 17
3342 ..... 6, 9, 10, 20, 21
3343 10
3445 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 175

MARCUS HAUGE,

Appellant,

vs.

THE CITY OF CHICAGO,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

Brief and Argument for Appellant.

Official Report of Case.

The opinion of the Supreme Court of Illinois is reported under the title, *City of Chicago* v. *Waters,* 363 Ill. 125, 1 N. E. (2d) 396. The majority opinion appears in the printed record in this Court (pp. 45-52) and the dissenting opinion filed by Chief Justice Stone and Mr. Justice Shaw also appears in the printed record (pp. 59-61).

Jurisdiction of this Court.

The jurisdictional statement of the appellant in compliance with paragraph 1 of Rule 12 has been printed by the Clerk and submitted to the Court. The opposing jurisdictional statement of the appellee, accompanied by its motion to affirm or to dismiss, has also been printed and submitted to the Court together with a brief of the appellant in opposition to the motion to affirm or to dismiss.

On October 12, 1936 this Court entered an order that further consideration of the jurisdictional question was postponed to the hearing. We respectfully refer the Court to the jurisdictional statements and brief heretofore filed and shall not repeat our argument in support of the jurisdiction of this Court.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the Supreme Court of the State of Illinois, two of the seven justices dissenting, which affirmed a judgment of The Municipal Court of Chicago, finding the appellant guilty of violating Section 2947 of the Revised Chicago Code of 1931 (R. 29). The violation was in delivering a load of coal weighed at the mine in accordance with the state statutes and trucked to a purchaser in Chicago, without reweighing the coal and obtaining as required by said Section 2947 a public weighmaster's certificate showing the gross, tare and net weight of the load.

The above section provides in substance that every commodity sold in load lots by weight and delivered by truck within the City shall be weighed by a public weighmaster and that a public weighmaster's certificate of the weight for each such load shall be delivered by the driver to the

purchaser of such load at the time of the delivery and before any of the commodity is removed from the vehicle.

Another section of the ordinance, Section 3623 (R. 40-41), provides that the public weighmaster's weight certificate shall state, *inter alia,* the commodity weighed, the date, the name and address of the purchaser or consignee, and when the commodity is loaded in a vehicle, the total or gross weight of the commodity weighed and the conveyance in which it is loaded, the tare weight of the vehicle, and the net weight of the commodity contained in such vehicle. This section also provides:

> "In no case shall any public weighmaster state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight as specified herein" (R. 41).

It was not disputed by the City of Chicago in either of the courts below that in order to comply with the ordinances which have been referred to it would be necessary to unload the coal within the City of Chicago to obtain the tare weight of the vehicle, then to reload the coal to obtain the gross weight of the vehicle and the coal, and that all of this must be done in order to obtain a public weighmaster's certificate which can be delivered to the purchaser *before any of the coal is removed from the vehicle on the premises of the purchaser.*

The coal which was delivered in the instant case was obtained from the mine of the Morris Coal and Mining Company at Morris, Illinois, and had been graded at the mine and weighed over State inspected scales (R. 13, 17-18) and the appellant was in possession of a delivery ticket filled in in accordance with the provisions of the statutes of the State of Illinois, showing the gross, tare and net weight of the load (R. 11). (The State statute referred

to is Ill. State Bar Stats., 1935, c. 147, par. 20, which is printed in full on page 9 of the appellant's printed statement as to jurisdiction, which is already before this Court).

It was not and is not contended here that the appellant was possessed of a public weighmaster's weight certificate as required by this ordinance. The prosecution was defended in the lower court on the ground that the ordinance, as applied to the appellant's business, is unconstitutional under Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it is unreasonable in its provisions requiring the rehandling of coal already weighed in accordance with the laws of the State of Illinois applicable to the place where the coal was placed upon the truck (R. 21).

The consumer in Chicago buys this coal from the mine either directly or through a local dealer, agent or broker (R. 17, 18). If a local dealer or broker intervenes in the transaction, the order is forwarded to the mine. A trucker who owns his own truck, such as the appellant in this case, is given this order at the mine office for delivery to the consumer in Chicago (R. 13). Upon the receipt of the order the trucker runs his empty truck over a State inspected scale at the mine and the mine weighmaster certifies the tare weight (*i. e.*, the weight of the empty vehicle) (R. 18). The trucker then drives off the scale to an immediately adjacent tipple and loads his truck with the kind of coal called for in the order and immediately returns to the same scale for a weighing of his gross load (*i. e.*, the weight of the coal plus the weight of the vehicle) (R. 14). The net weight of the load is then obtained by subtracting the tare weight from the gross weight, and the tare, gross and net figures are written on a delivery ticket by the mine weighmaster (R. 18).

The ordinance in question permits persons owning scales within the City of Chicago to be licensed as public weighmasters and their employees to be licensed as deputies. A two thousand dollar bond must be posted and a weighmaster's seal procured. The coal dealer owning a scale and licensed as a public weighmaster by these sections of the ordinance is permitted to weigh his own coal over his own scale. (The sections of the Revised Chicago Code of 1931 which provide for the appointment of such weighmasters, in so far as relevant here, are Sections 2955, 3612, 3613, 3614, 3616, 3617, and 3623, which are printed in full on pages 3 to 7, inclusive, of the appellant's statement as to jurisdiction, and also appear in the printed record (pp. 32, 38-39, 40-41) and are therefore not repeated here.)

It was shown that the Morris Coal and Mining Company could not obtain a license as a public weighmaster in the City of Chicago for the year 1935, although it was able to procure such a license prior to that time (R. 18). The ostensible reason for this refusal was that the Company was resident outside of the City of Chicago and therefore not embraced within the provision of Section 3612 of the Revised Chicago Code of 1931, providing who "shall be eligible for appointment as a public weighmaster *in the city of Chicago*" (R. 38; italics ours).

It was not disputed in either of the courts below that under the ordinances of the City of Chicago a non-resident owning a scale outside of the City of Chicago could not obtain a license as a public weighmaster. The majority of the Supreme Court of Illinois held (R. 50) that the weighing of the coal over the State inspected scale at Morris, Illinois, was not a compliance with the ordinance, and the minority opinion expressly stated (R. 60) that "the complaining mining companies cannot obtain weighmaster's certificates, thus effectually shutting out of the

markets of the City of Chicago a commodity that the people have a right to buy."

The evidence shows that if coal which had been weighed at the mine is required to be unloaded and weighed again inside of the city limits of Chicago the cost of this rehandling is approximately 50c to $1.00 a ton and would require the establishment of a coal yard inside the City of Chicago where the unloading and weighing could be done (R. 19). This cost is occasioned by the labor involved in unloading the coal from the truck in order to get the tare weight and reloading it again.

It is also apparent that such rehandling of bituminous coal tends to break down the grade. If the grade is broken down the coal cannot be delivered without violating Section 3342 of the Revised Chicago Code of 1931, which is printed in full on page 16 of our brief in opposition to the appellee's motion to dismiss the appeal or affirm the judgment and is also set forth in the record (pp. 33-35). Obviously, there is no way for the trucker to regrade his coal after leaving the mine unless he maintains a coal yard in the City of Chicago and equips it with grading screens and a tipple.

No charge of short weight is involved in the present proceeding. The appellant testified, without contradiction, that:

> "I was not weighed by the city inspector. I asked if they wanted to weigh it and they said no, they knew our weights were right and they didn't want to bother us with it. The sealer who stopped me said that" (R. 14).

Ralph McElvain, the president of the Mining Company whose coal is involved, testified that his company had no complaints from its customers as to short weight (R. 19).

After the opinion of the Supreme Court of Illinois was originally filed in this case, and pending a rehearing, the City Attorney of Ottawa, Illinois, the State's Attorney of LaSalle County, Illinois, the City Attorney of Morris, Illinois, and the State's Attorney of Grundy County, Illinois, filed a petition in the court below (R. 53-57) as *amici curiae* praying that the court allow a rehearing on its own motion, in which petition they stated among other things:

(a) That holding Section 2947 valid imposes an embargo on Grundy and LaSalle County coal because the handling costs of approximately $1.00 per ton required to comply with the ordinance makes it impossible for mine operators to compete with Chicago dealers.

(b) That the decision will close the Illinois Valley mines which are not adjacent to rail connections and that approximately two thousand families in Grundy County alone are dependent for their livelihood upon the mines affected by the decision.

(c) That the effect of this ordinance is to impose a barrier on trade in commodities produced in these counties and sold by weight in load lots in Chicago, and affords a method by which various communities of the State can erect trade barriers between themselves contrary to the public interest.

(d) That the method of weighing makes it impossible for farmers to weigh their produce in Chicago in that it compels a dumping of the load.

(e) That weighing the loaded truck before delivery and a return to the scales after delivery to determine the tare weight of the truck would as a practical matter give the same protection to the consumer and would provide a reasonable method of weighing which the mines can comply with.

(f) That the Court should take judicial notice that there are no so-called public weighmasters' scales in Chicago except in coal yards competing with the Illinois River Valley mines and that such yards do not permit the dumping of coal, so that a compliance with the ordinance is impossible.

No answer was filed to this petition, but the petition was denied (R. 61).

The City of Chicago attempts to justify the enforcement of this ordinance on the theory that the ordinance is *necessary* in order to furnish the customer protection against short weight. In considering the merit of the City's theory it should be noted that there are other penal provisions of the ordinance which furnish adequate safeguards to the purchaser respecting coal which has already been weighed once on a State inspected scale pursuant to the general statutes of the State in force where the truck of coal was loaded.

The State statute on weights and measures, which has already been referred to and which is printed on page 9 of the appellant's jurisdictional statement, requires that a delivery ticket showing the gross, tare and net weight of coal shall be surrendered upon demand *to any city inspector of weights and measures* for his inspection and shall be delivered to the purchaser of the coal at the time of the delivery of the fuel.

Section 39 of the same chapter of the Illinois statutes (Ill. State Bar Stats., 1935, c. 147, par. 39) provides, *inter alia,* that any person who uses in selling any commodity any weighing device which has not been sealed by the State Director of Trade and Commerce, or by a city inspector of weights and measures, within one year, or who shall sell less than the quantity he represents, or who shall

violate any provision of the act for which a specific penalty has not been provided, "shall be guilty of a misdemeanor, and shall be punished by a fine of not less than $20, nor more than $200, or by imprisonment for not more than three months, or by both such fine and imprisonment, upon a first conviction, in any court of competent jurisdiction; and upon a second or subsequent conviction in any court of competent jurisdiction he shall be punished by a fine of not less than $50 nor more than $500, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment."

Section 3342 of the Revised Chicago Code of 1931, set out verbatim in the record (R. 33-35) requires a delivery ticket similar to that provided by the State statute. This section also provides for the surrender of the delivery ticket to the city inspector of weights and measures or to the purchaser, on demand, and provides that,

> "whenever said officer or any of his deputies, or the purchaser or intending purchaser, or his agent or representative, or the person to whom delivery is to be made, shall demand that the said weights shown by said ticket or tickets be verified, it shall thereupon become the duty of the person, firm or corporation delivering such fuel to convey the same forthwith to some public scale selected by the inspector of weights and measures of the city of Chicago, or any of his deputies, or the purchaser or intending purchaser of the fuel being delivered, or his agent or representative, or the person to whom delivery is to be made, in the particular locality where the solid fuel is to be delivered, or to any private scale in the particular locality where the owner thereof shall consent to such use, and permit the weighing of the solid fuel, together with conveyance and equipment, for the purpose of

ascertaining the gross weight thereof, and shall, after the delivery of such fuel, return forthwith with the conveyance and equipment used in the delivery of such solid fuel to the same scale and permit the weighing of said conveyance and equipment for the purpose of verifying the net weight of the solid fuel, as shown by the said ticket or tickets."

The following section, Section 3343 of the Revised Chicago Code of 1931 (R. 35-36), imposes a fine of not less than $25.00 nor more than $200.00 for the offense of delivering or attempting to deliver fuel within the City of Chicago of a quantity less than that called for by the delivery ticket or tickets. This section also imposes a fine of not less than $10.00 nor more than $50.00 for making or attempting to make a delivery without a delivery ticket or without delivering such delivery ticket to the purchaser or the city inspector of weights and measures before the fuel is removed from the conveyance. It further imposes a fine of not less than $10.00 nor more than $50.00 for any violation of Section 3342, just referred to, for which no other specific penalty is provided. This latter provision imposes a penalty for refusal to verify the gross, tare and net weight of the loaded vehicle upon the demand of the city inspector of weights and measures or of the purchaser, as provided in Section 3342.

The majority opinion of the Supreme Court of Illinois held that Section 2947 of the ordinances, under which the appellant was convicted and whose constitutionality is here challenged, furnished a reasonable method of reweighing a load of coal which had previously been weighed in accordance with the State statute, on the theory that such reweighing was a natural and reasonable method of weighing a load of coal sold and delivered *from a coal yard in the City of Chicago,* and that to recognize the

claim of the appellant that the ordinance is unconstitutional as applied to the appellant would discriminate between local dealers and non-residents. The court held that if it was necessary in order to comply with the ordinance to establish a coal yard inside the City of Chicago that was merely an incidental problem to be solved by the mining company.

The court below referred to its holding in *City of Chicago* v. *Wisconsin Lime & Cement Co.*, 312 Ill. 520 (decided in the year 1924, before the business of trucking coal from mine direct to consumer had come into existence) and although conceding that the attack on the validity and constitutionality of the ordinance made in the present case is not the same as was decided in that case, yet held that the difference in methods of transportation involved in that case and in the present case did not justify holding the ordinance unconstitutional as applied to the business here involved. The court held that the ordinance was not a violation of the Federal Constitution (R. 47-52).

Two of the judges dissented in an opinion (R. 59-61), stating that the effect of the ordinance is to confer a monopoly in the coal business upon dealers residing within the City of Chicago to the exclusion of other citizens residing outside of the city, that this is apparent from the requirement that the empty truck be weighed before the load is delivered to the purchaser and that they could not perceive any reason why the purchaser could not as well be protected by weighing the empty truck after delivery, which they said would give an accurate net weight, "which is the only point as to which the public may require protection, and if that is the true purpose of the ordinance, which it obviously is not, it would serve all legitimate purposes." They held it clearly unreasonable to require that a load of coal coming into Chicago be unloaded, the truck

weighed, then the coal reloaded and weighed again, and that the extra and useless handling could inure only to the benefit of local dealers and could result only in penalizing the consumer and the outside producer. They said that the ordinance was unconstitutional because it arbitrarily interferes with private business and imposes unusual and unnecessary regulations upon a lawful occupation. They distinguished the case of *City of Chicago* v. *Wisconsin Lime & Cement Co.*, 312 Ill. 520, on the ground that in that case the dealer was permitted to be appointed a public weighmaster, whereas in the present case the record shows that the mining company cannot obtain a weighmasters' license. The dissenting judges concluded their opinion as follows:

> "To put the unreasonable and unnecessary burden of unloading, weighing the truck and reloading the coal, upon those who would offer coal to residents of the city of Chicago, from the outside of that city, is not in the interest of the public welfare and is not necessary to secure honest weights.
>
> "It is quite as much in the interest of the public welfare that the people of the city of Chicago be afforded access to cheap markets for the necessities of life as it is that weights be watched. To so restrict access to such market by putting such unnecessary expense on the purchaser is clearly unreasonable.
>
> "It is likewise an unjust discrimination against large communities that happen to be so situated as to enable them to take coal from the ground cheaply and thus give a livelihood to thousands working in that business.
>
> "It is well known that there are many sources of cheap coal within trucking distance of Chicago, and that by loading directly onto a truck at the mine and

unloading directly into the consumer's bin, many handling charges are avoided. While such competition is clearly disadvantageous to Chicago coal dealers, it is certainly advantageous to the mine owners and those citizens of Chicago who wish to purchase this kind of coal. No one can doubt the legal right of these mine owners and consumers to deal directly with each other if they choose so to do, and, in our opinion, an ordinance which throws an artificial and unreasonable barrier across the path of this commerce, without any corresponding benefit to the health, morals, safety or welfare of the people, is void" (R. 60-61).

Specification of Errors

(R. 61-62, 108-109).

1. The Supreme Court of Illinois erred in holding that Section 2947 of the Revised Chicago Code of 1931, under which appellant was convicted, does not deny to the appellant the equal protection of the laws guaranteed to the appellant by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Illinois erred in holding that said Section 2947 does not deprive the appellant of liberty and property in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of Illinois erred in affirming the judgment of The Municipal Court of Chicago.

SUMMARY OF ARGUMENT.

I. The ordinance here involved is unreasonable in requiring coal already once weighed to be unloaded in order to be weighed again before delivery to the consumer, because reasonable methods exist for verifying the weight which would accomplish every purpose of the existing ordinance without requiring such unloading. Other provisions of the State statutes and of the Chicago ordinances adequately protect consumers against short weights. Other sections of the city ordinances also recognize the unreasonableness of requiring a vehicle already loaded to be unloaded before delivery for the purpose of obtaining the tare weight. The appellee has conceded that the unloading requirement is drastic and cannot escape this concession, as it has attempted to do in this Court, by arguing that the ordinance does not require such unloading. The construction of the ordinance (as requiring such procedure) by the Illinois Supreme Court is binding on the parties and on this Court. In deciding that this ordinance is reasonable the Illinois court ignored the vitally material fact that the coal had been once weighed at the mine over State-tested scales. Requiring appellant to establish a coal yard to comply with this ordinance is unreasonable. It is as much in the public interest that the people of Chicago be afforded access to cheap markets for necessities as it is that weights be watched. This ordinance nullifies economies effected by trucking coal direct from the mine to the consumer. The ordinance is unreasonable as applied to appellant's business and is unconstitutional and void under Section 1 of the Fourteenth Amendment.

II. The appellant is not seeking a discrimination in his favor. He is in a different business than that of operating a Chicago coal yard and while the ordinance is reasonable as to such a coal yard, which alone it was originally designed to regulate, it is not reasonable when applied to the appellant's business, which arose after the passage of the ordinance. The ordinance does not impose an equal loss upon the local dealers and upon the appellant because it is not the ordinance which imposes on the local dealer the burden of operating a coal yard, rather it is his method of doing business, whereas it is the ordinance which requires the appellant to operate a local coal yard in order to have some place to dump and reweigh his coal. The ordinance gives the local dealer the privilege of weighing his coal at the point of original loading and denies a similar right to the appellant.

III. The City of Chicago is by this ordinance discriminating against the trucking of coal directly from the mine to the Chicago consumer for the improper purpose of protecting local coal dealers from competition. The unreasonable discrimination against the appellant's method of doing business results in loss of his liberty and property and also is detrimental to the public. The ordinance discriminates against the appellant in allowing a local coal dealer to be licensed as a public weighmaster to weigh his own coal in his own yard and in denying that right to the appellant. Because the ordinance is unreasonable and unnecessary and is discriminatory it is void under Section 1 of the Fourteenth Amendment.

ARGUMENT.

I.

The requirement in the Ordinance complained of that coal in transit by truck from mine to consumer must be dumped in order to get the tare weight of the empty vehicle is an unnecessary and unreasonable restriction on a legitimate business, and is therefore unconstitutional and void under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Section 2947 of the Ordinance in question (R. 29) provides:

> "Every load of any commodity, produce or other article or articles of merchandise sold in load lots by weight, delivered by wagon, truck or other vehicle within the city, shall be weighed by a public weighmaster; a certificate of weight for each such load, issued by such public weighmaster, shall be delivered by the driver or person in charge of the wagon, truck, or other vehicle used in the delivery, to the purchaser or consignee of such load, or to his or their agent at the time of the delivery and before any of the commodity, produce or other article or articles of merchandise is removed from the vehicle * * *."

In order to obtain such a certificate from a public weighmaster, the weighing must take place in accordance with

Section 3623 of the ordinances which provides (R. 41) among other things,

> "In no case shall any public weighmaster state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight as specified herein; * * *."

The vice of the above sections is that they require appellant and others engaged in the business of trucking coal direct from mine to consumer to dump the load en route in order to permit a so-called public weighmaster to certify the tare weight. This is an unnecessary and unreasonable restriction on appellant's business.

While the power to enact a reasonable ordinance regulating methods of weighing coal or other commodities sold in load lots exists, this power is subject to the definite limitation that the State cannot, under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions on them.

Jay Burns Baking Co. v. *Bryan*, 264 U. S. 504, 513;

Dobbins v. *City of Los Angeles*, 195 U. S. 223, 235-240;

Pierce v. *Society of Sisters*, 268 U. S. 510, 534, 535;

Weaver v. *Palmer Bros. Co.*, 270 U. S. 402, 412, 415;

Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1, 9, 11.

Appellant's contention under this point is not that every regulation is unconstitutional but that the ordinance in question is unreasonable and therefore void and unconsti-

tutional because it is not necessary to require—as this ordinance does—the rehandling of the coal and the reweighing of the empty vehicle before delivery in order to get a tare weight of the vehicle. The issue here is not between the present ordinance and absence of all regulation, but the issue is between the unreasonable regulation imposed by this ordinance and some reasonable ordinance which the appellee has ample power to enact.

It has been pointed out in our jurisdictional statement and the brief filed in opposition to the City's motion to dismiss this appeal that a reasonable ordinance can be enacted which would obviate the vice of the present regulation without losing a single benefit intended to be accomplished by it and which would nevertheless eliminate entirely the cause of complaint against the present ordinance. This can be done by providing:

(a) That the tare weight be registered and stenciled on the vehicle and the gross weight be certified by a public weighmaster, or

(b) That the gross weight of the vehicle and load be determined by a public weighmaster before delivery of the coal to the customer and that the tare weight be determined and certified on the delivery ticket by the public weighmaster after the vehicle is unloaded and before the customer shall become liable for the payment of the price of the coal.

Either method obviates the unreasonable provision of the present ordinance that the coal be unloaded en route from mine to customer, and yet each would compel a weighing on a public weighmaster's scale inside the city limits and would provide for the delivery to the customer of a public weighmaster's certificate. The second method insures the return of the trucker to the public weigh-

master to ascertain the tare weight of the vehicle by the provision that the customer be not required to pay for the coal until the tare weight is thus certified. This would permit the dumping of the coal on the premises of the buyer after obtaining a certification of the gross weight and would compel a return to the scales for a certification of the tare weight.

The only reason ever suggested by the City as to why it was necessary to apply this ordinance to appellant's business is stated by the counsel for the City in their brief in support of the motion to dismiss this appeal. That suggestion clearly discloses the weakness of their case. They say:

> "Furthermore, on the long haul to Chicago, perhaps a night haul, a portion of the load may be lost, some of it may be bartered for gasoline en route, and there is no assurance that the customer would receive the quantity weighed at the mine."

All or any of these things may equally well be done within the city limits of Chicago by a dishonest driver for a local dealer after obtaining a weighmaster's certificate. Where coal is shipped by truck from the mine, a weighing of the loaded truck in Chicago as suggested by us would immediately disclose any discrepancy in weight as compared with that shown on the mine delivery ticket issued in accordance with the State statutes. In the instant case, there is no short-weight, nor is there any logical basis for a blanket assumption of dishonesty. The Supreme Court of Illinois, in the case of *City* v. *Kautz,* 313 Ill. 196, held that a section of the ordinances in question which attempted to give the city officials power to reweigh coal which had already been weighed was unreasonable, and said:

> "Under these ordinances the only way for the coal dealer to cheat his customers is to steal coal from the

wagon after it has been weighed. This he could not do unless he entered into a conspiracy with his drivers. * * * The likelihood of a dealer entering into a conspiracy with his drivers to steal his customers' coal is so remote that the regulation cannot be sustained on that ground."

In fact, when the other provisions of the present ordinances and of the State statutes are read it is quite clear that the purchasers of coal are adequately protected by the check imposed on mine weights by Section 3342 of such ordinances (R. 33-35), which is set forth at page 9 of this brief, and which requires the seller to verify the weight by a reweighing upon demand by the purchaser or by the city inspector of weights and measures.

To that provision there can be no valid objection, because its enforcement does not require *unloading and reloading* of the coal before delivery. It permits the weighing of the coal and vehicle together before unloading the coal on the premises of the purchaser and permits the return after the delivery to the scale in order to determine the tare weight. Other sections of the ordinance provide for a fine upon conviction of the offense of giving short weight (R. 31).

In the instant case, the proof shows a valid weighing under the State Statutes over State inspected scales at Morris, Illinois (R. 14, 18). As pointed out, to obtain a weighmaster's certificate, this appellant would have had again to weigh his coal and to comply with the ordinance would have had to dump his load. That this rehandling charge is unnecessary and consequently unreasonable was clearly perceived by the dissenting justices when they stated (R. 59):

"In our opinion the ordinance set forth in the foregoing opinion is unreasonable and should be held void.

> * * * This is apparent from the requirement that the empty wagon or truck must be weighed before the load is delivered to the purchaser. We cannot perceive any reason why the purchaser could not as well be protected by weighing the empty wagon or truck after delivery. This would permit hauling the load across public scales to obtain the gross weight, the unloading of the commodity, followed by weighing the empty wagon or truck to obtain the tare weight, and the subtraction of the tare from the gross to obtain the net. This procedure would give an accurate net weight, which is the only point as to which the public may require protection, and if that is the true purpose of the ordinance, which it obviously is not, it would serve all legitimate purposes. Under such an ordinance, producers of coal or other commodities who live outside of Chicago could deliver their produce within that city and the residents of that city could have the benefit of whatever savings might be involved. It is clearly unreasonable to require that a load of coal coming into Chicago be unloaded, the truck weighed, then the coal reloaded and weighed again. This extra and useless handling charge can inure only to the benefit of local dealers and it can only result in penalizing the consumer and the outside producer."

The requirement that the tare weight must be officially determined prior to delivery, although the truck is already loaded, is inferentially recognized as unreasonable by the Chicago City Council itself, because under all other sections of the City's ordinance dealing with a verification of a tare weight after the commodity is loaded such tare weight may be determined after the delivery of the load to the purchaser. See Sections 2939, 2950, 2951, 3342 and 3445 (R. 28, 29, 30, 33, 37).

Recognizing the substantial character of appellant's complaint, the City of Chicago, after acting to the contrary in its administration of the ordinance for many years and after contending to the contrary in both courts below, now, in its motion to dismiss filed herein, seeks to evade the issue of whether the unloading requirement is unconstitutional by saying:

> "This [the ordinance] leaves the manner and time of ascertaining the tare weight to the public weighmaster and the provision is by no means so drastic as appellant's counsel or the dissenting justices state."

Significantly, appellee does not intimate any other method of complying with the ordinance than by unloading and reloading the truck before delivery. On the contrary, in its brief in support of its motion to dismiss it denies any validity to the other methods of checking the mine weight suggested by the dissenting justices or by the appellant.

Had the Supreme Court of Illinois construed this ordinance as not requiring appellant to unload and reload his coal en route to the consumer, the complaint made by appellant in the court below would have been obviated and the appellant would not now be appealing to this Court. However, that Court instead determined that it is necessary to dump and reweigh the load in order to get a weighmaster's certificate. It said (R. 50):

> "It is more convenient, and doubtless less expensive, for the particular dealer to weigh his truck, both empty and loaded, on the public weighmaster's scale at Morris. *This, however, is not a compliance with the ordinance.* The defendants claim it is unreasonable to require them to unload their trucks after enter-

ing Chicago, weigh the truck empty and then reload and make delivery, and that the coal is always damaged and that there is always a loss of coal occasioned by the unloading and reloading." (Italics ours.)

Further on in its opinion the Court said of appellants (R. 52):

"They have merely elected to do their business in a manner more convenient to them and different from the method prescribed by the ordinance."

Mr. Chief Justice Stone of the Illinois Supreme Court and Mr. Justice Shaw, dissenting, recognized the vice inherent in the ordinance and said (R. 59):

"It is clearly unreasonable to require that a load of coal coming into Chicago be unloaded, the truck weighed, then the coal reloaded and weighed again."

It is, therefore, clear that in both the majority and minority opinions the court construed the ordinance as requiring a reweighing involving a rehandling of the coal in the City of Chicago. This is in conformity with the previous contentions of the appellee and with its methods of administering the ordinance for many years, and the contrary suggestion is merely a tardy admission that the requirement that the load be rehandled is "drastic" and unreasonable.

The majority opinion of the court below stated (R. 48):

"It is immaterial to the issues here that the coal in question was weighed outside of the City of Chicago on State-tested scales."

This statement indicates that the court ignored facts which were very material to a proper determination of the

reasonableness of the ordinance. The fact that coal shipped by truck from mine direct to consumer has been in the first instance weighed over State-tested scales is an exceedingly important factor in determining what additional regulations are reasonable, because the entire ostensible purpose of the ordinance involved here is the ascertainment of correct weights. We respectfully submit that the reasonableness of the ordinance as applied to the business of the appellant was not properly determined by the Supreme Court of Illinois because it excluded as immaterial the vitally important fact that appellant's load had been once weighed on proper scales.

A consideration of whether the harsh and concededly drastic measure here applied to appellant's business is necessary for accomplishing the end sought cannot be avoided, because the necessity for an ordinance bears directly on its reasonableness. As said by this Court in the case of *Louis K. Liggett Co.* v. *Baldrige,* 278 U. S. 105, 113:

> "A state cannot, 'under the guise of protecting the public,' arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' "

There can be no doubt that if this ordinance is held valid, it means the complete and total destruction of appellant's present business. The Supreme Court of Illinois said:

> "The facts, if there be such, that it may be necessary to establish coal yards in Chicago, ship by rail in car-load lots, unload from the car and deliver to the purchaser, or submit to an unloading and re-weighing of the coal in the event that coal moves into Chicago by trucks, are incidental problems, to be solved by the coal company in the event it desires to sell in the Chicago market" (R. 51).

An ordinance which requires a coal yard to be established as a condition precedent to doing a coal business has been held unconstitutional in the case of *May Grain & Coal Co.* v. *Kansas City, Mo.*, 10 Fed. Supp. 792. In that case the city was enjoined from enforcing an ordinance which required all retail coal dealers in Kansas City to "possess and own proper equipment for the operation of such retail business within the limits of the city; such equipment shall consist of a coal yard or station with reasonable facilities therefor, an office and a wagon scale of at least five ton capacity."

The Court said:

> "The enforcement of the ordinance against the plaintiff has destroyed that business or will do so unless the city is enjoined from such enforcement. This would result in depriving it of 'property without due process of law' within the first section of the 14th Amendment to the National Constitution.
>
> "The city would have no right to do this unless it was essential to protect the residents of the city against imposition. • • •
>
> "To the extent that the ordinance required an established place within the city, it was unreasonable and thus deprived plaintiff of its property without due process of law."

The ordinance in question takes from appellant and others similarly situated ruthlessly and unreasonably their means of livelihood, and its enforcement will close down the mines located in the Illinois River Valley (R. 54).

We submit that no ordinance which produces results so contrary to rights of the general public as are produced by this ordinance can have any presumption in-

dulged in its favor. As stated by the dissenting justices (R. 60):

> "It is quite as much in the interest of the public welfare that the people of Chicago be afforded access to cheap markets for the necessities of life as it is that weights be watched. To so restrict access to such market by putting such unnecessary expense on the purchaser is clearly unreasonable."

Since the regulation is unreasonable when applied to the appellant's business, it is, under the cases cited under this heading, unconstitutional and void under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

II.

The appellant seeks no discrimination in his favor but only a reasonable manner of checking mine weights which does not nullify the saving to the consumer by reason of his more efficient method of doing business.

The Supreme Court of Illinois said in its majority opinion (R. 50):

> "To recognize the demand of the defendants would be to discriminate between the local truckmen and dealers in Chicago in favor of non-residents."

It further said (R. 52):

> "They have merely elected to do their business in a manner more convenient to them and different from the method prescribed by the ordinance."

We cannot emphasize too strongly the fact established by the uncontradicted evidence that this "more convenient"

method of doing business results in a saving to the consumer of anywhere from fifty cents to a dollar a ton on each ton of coal purchased. It is not the fact that this method is convenient that is important but the fact that it is soundly grounded in a public policy which demands that a saving in the cost of a necessity of life be made available to the public.

The ordinance in question was obviously designed to furnish a certification of an original weighing taking place within the city limits of Chicago. This is further evidenced by the facts that it was enacted before the building of hard roads made possible the trucking of coal from the mines to the Chicago market and that only the coal dealer in Chicago was permitted to be his own "public weighmaster".

It was held reasonable as applied to the business of selling coal from a Chicago coal yard by the Supreme Court of Illinois in the case of *City of Chicago* v. *Wisconsin Lime & Cement Co.*, 312 Ill. 520, because (p. 524):

> "The ordinance is liberal in permitting dealers themselves to be appointed weighmasters or have their own employees appointed deputies, for their own convenience."

A non-resident cannot be appointed a weighmaster under the ordinance.

The fact that the ordinance is reasonable as applied to a coal dealer doing business by one method does not prove it reasonable as to a dealer doing business by an entirely different but equally lawful method.

Since its passage a new method of marketing and selling coal has been developed. This is the business of trucking coal weighed at the mine in accordance with State statutes directly to the consumer in Chicago. *It is this new busi-*

ness in which the appellant is engaged. It grew up because of large savings to the consumer entailed by saving the handling charges amounting to approximately a dollar a ton involved when coal is sold through a coal yard (R. 19).

The department of weights and measures of the City of Chicago, by applying this ordinance to this new method of doing business, has compelled the rehandling of the coal in the City of Chicago and the consequent result is the nullification of all the saving resulting from this new method of marketing coal.

If this saving to the consumer is to be legally barred merely because coal was being sold in Chicago only through a coal yard at the time of the passage of this ordinance, then the coal business is placed in a "strait-jacket" and all progress in more economical methods of marketing coal is forever precluded. When we contend that the more economical method of selling coal under regulations which are merely designed to check weights should be permitted without requiring a rehandling of the coal, we ask for no discrimination but merely ask that the Chicago market be made free.

As the minority opinion says (R. 60-61):

> "It is well known that there are many sources of cheap coal within trucking distance of Chicago, and that by loading directly onto a truck at the mine and unloading directly into the consumer's bin, many handling charges are avoided. While such competition is clearly disadvantageous to Chicago coal dealers, it is certainly advantageous to the mine owners and those citizens of Chicago who wish to purchase this kind of coal. No one can doubt the legal right of these mine owners and consumers to deal directly with each other if they choose so to do, and, in our opinion, an

ordinance which throws an artificial and unreasonable barrier across the path of this commerce, without any corresponding benefit to the health, morals, safety or welfare of the people, is void."

The statement in the majority opinion to the effect that holding this ordinance unconstitutional would discriminate against Chicago dealers and truckers fails to recognize that a dealer selling coal direct from mine to consumer is not in the same business as a dealer selling coal from a local coal yard.

The majority opinion further states (R. 49):

"It is a matter of common knowledge that enormous quantities of coal are moved by both rail and water to Chicago and there held in coal yards, bins, or structures for the storage of coal until moved therefrom to the purchaser, and occasionally coal may be hauled from the car or vessel in vehicles direct to the consumer. As to coal thus transported and sold, an ordinary and natural way to regulate the weighing of the load would be to weigh the vehicle empty and then weigh the same vehicle after it is loaded for delivery to the vendee."

We agree that as to coal thus transported, the ordinance furnishes a reasonable method of obtaining an original weight which the dealer must determine in any event, and regardless of the ordinance, in order to know how much he sells his customer. The only burden imposed by the ordinance on the local coal dealer selling from a yard is that of giving a $2000.00 bond as a public weighmaster and supplying himself with a public weighmaster's seal. He then does the weighing himself or by his employees who may under the ordinance be deputized as weighmasters (R. 38).

If, however, the same dealer wants to sell coal direct from mine to consumer he must under this ordinance bring the coal into his yard and reweigh it even though it has been weighed and graded at the mine in accordance with State statute. *The fact that the dealer is a resident or non-resident is of no significance* except as it bears on the method of doing business. The significant thing is that the new method of business is discriminated against by compelling it to undergo the same method of weighing as is necessary to obtain the original weight where coal is graded and weighed from an indiscriminate mass in a coal yard.

The two businesses are different and the Supreme Court of Illinois failed to perceive that "what is ordinary and natural" as a regulation for the business described by the court is for that very reason extraordinary and unnatural and therefore unreasonable when applied to the situation presented here.

It is clear, therefore, that this Court can declare the ordinance unconstitutional as an unjust and unreasonable restriction on appellant's business without discriminating in the slightest in favor of non-residents as against residents. The Chicago dealer would then be free to go into the same business without rehandling the coal in his yard in Chicago. The original mine weights having been certified in accordance with State laws, the only regulation necessary is to check these weights and to do this we have pointed out that it is not necessary to go through the burdensome procedure imposed by this ordinance. As to this method of doing business, both Chicago and non-resident dealers would be placed on the same basis. It is also obvious that declaring this ordinance unconstitutional when applied to the appellant's business does not make it unconstitutional when applied to obtaining a cer-

tificate of weight of an original weighing of coal sold from a Chicago coal yard.

The majority opinion of the Supreme Court of Illinois is also disclosed to be based on a false premise when the Court says (R. 50):

> "Such loss sustained by unloading and reloading however, is common to those dealers who maintain coal yards and bins in the city of Chicago for the sale of coal and who comply with this ordinance."

What the court here compares is the two methods of doing business, namely, the operation of a local coal yard, and the selling of coal direct from mine to consumer.

Contrary to its statement, the loss occasioned is not common to both because the *rehandling* occasioned by operating a coal yard *is not caused by the ordinance.*

The local dealer's loss in rehandling the coal arises by virtue of his method of doing business—not from the operation of the ordinance. Since the coal is shipped by rail into the yard, where it is dumped as an indiscriminate mass, it must be weighed and graded whether there is any ordinance or not. *The ordinance was not originally enacted to cause or require this rehandling but to regulate it* and, since the coal must be weighed in any event, there can be no objection on the part of the operator of a coal yard to the method of weighing prescribed by the ordinance since he may himself be a public weighmaster. Applied to appellant's business, however, where there is no inherent need for dumping the coal after it leaves the mine the further handling *is caused solely by the operation of this ordinance.*

If after coal has been weighed and graded in a coal yard and has left the yard in transit to the consumer the

City of Chicago should step in and say it had to be reweighed and rehandled an analogous case would be presented. This second weighing would be an unreasonable and unnecessary restriction on the business of operating a coal yard. The Supreme Court of Illinois has so held in the case of *City of Chicago* v. *Kautz*, 313 Ill. 196.

We submit that it is clear that appellant seeks no discrimination. If he starts to operate a coal yard in the City of Chicago, he of course becomes subject to the ordinance. It is the only way he could obtain an original weight, because the coal would come to him in the first instance as an indiscriminate mass which he would have to weigh somehow. Conversely, if the Chicago dealer starts to sell coal direct from mine to consumer, he is not subject to the ordinance if it is held unconstitutional as to that business.

III.

When this ordinance is applied to appellant's business it does discriminate against such business contrary to the Fourteenth Amendment of the Constitution of the United States.

We have pointed out as a practical matter this ordinance excludes from the Chicago market appellant's method of doing business. It would be, of course, almost impossible for the appellant to prove improper motive of the law enforcement officers of the City of Chicago. In their brief in support of the motion to dismiss this appeal, they say:

> "If the ordinance were not enforceable, then the conditions prevailing prior to 1924, when it was enacted, would recur and practices of fraud, short weighing and chicanery again prevail. Then the *retail coal industry of Chicago would be demoralized by unfair and unethical competition* * * *." (Italics ours.)

When the City expresses concern for the retail coal industry of the City of Chicago, it thereby discloses that this whole matter has a competitive origin and that the consuming public is to be penalized by being required to pay unnecessary handling charges to protect retail coal dealers, but ostensibly exacted in the name of the police power. Since the only time the City is concerned about this competition is when it results in a saving of a handling charge of somewhere between fifty cents and a dollar a ton to the consumers of the coal, it must be patently clear that the City of Chicago is really trying to protect its local coal yard operators from lawful, legitimate competition resulting from a more efficient method of doing business, and that it is trying to accomplish this under the guise of protecting the public from short-weight.

If the ordinance were not enforcible as to this business, for competitive reasons the saving in the handling charge would have to be passed on to the consumer. This new method of doing business therefore comes in direct competition with the more expensive method of selling through a coal yard. Therefore, if the local dealer can keep all of this cheap coal out of the market he is given a tremendous competitive advantage.

If the City in referring to "unfair competition" means dishonesty in the matter of weights, we submit that there is no reason for saying that the non-resident is less honest than the resident coal dealer. Dishonesty is not a matter of miles. In any event this ordinance does not in any manner protect the consumer from dishonesty. For example, suppose a dealer in Chicago wishes to cheat his customer. He can load the coal over a public weighmaster's scale and obtain a weighmaster's certificate. After he has obtained this he can adulterate the coal, change its grade, take off some of the load, or do any number of

things to cheat his customer so far as this ordinance is concerned. All he needs to comply with this ordinance is the weighmaster's certificate showing the gross, net and tare weights. This certificate is obtained at the scales, but after leaving them there are 3631 miles of streets and 912 miles of paved alleys within the city limits (R. 55) and upon which he can drive and upon which, if he is dishonest, he can cheat his customer. It is therefore clear that the ordinance has no effect whatever in preventing dishonesty after the original weighing. The only ordinance which deals with that question is one imposing penalties for short weight, of which this appellant makes no complaint.

The City's counsel further said in their brief supporting the motion in this Court to dismiss our appeal:

> "To a greater degree the user needs protection when coal is delivered to him by irresponsible, itinerant, part-time truckers using a miscellaneous lot of vehicles instead of regular coal trucks, from a mine 62 miles from Chicago."

However, if the itinerant, irresponsible, part-time trucker buys his coal from, or weighs his coal in a Chicago coal yard, he is supplied with a weighmaster's certificate, and the ordinance in no way regulates him or his business after this weighing. It is not necessary that he present a certificate of good moral character to get a weighing nor must he have a certain standard type of truck. It is therefore apparent that it is only when the mine owner, dealer or trucker attempts to save rehandling charges in Chicago that the City becomes concerned about whether he is "itinerant, irresponsible or part-time."

On its face the ordinance does not concern itself with the question of who should be in the coal business. It

is not ostensibly designed for any other purpose than the certifying of original weighings taking place in Chicago. When, therefore, the City manifests an interest in protecting retail coal dealers by utilizing this ordinance to check weights originally obtained under State laws it would seem clear beyond peradventure that the City by its application of this ordinance intentionally discriminates against appellant's business. What public interest is served by compelling appellant to abandon this business and go into the business of operating a coal yard in Chicago?

If the City of Chicago were honestly enforcing this ordinance for the benefit of the public, as distinguished from "retail coal dealers," it would be interested and concerned in preserving for its residents the inherent saving involved in transporting coal from the mine to the bin of the consumer.

Protection of the public against short weight is to protect the public against paying excessive prices for what it buys. Prohibiting the practice of the economies which the appellant's method of doing business effects is manifestly contrary to the very theory of public welfare which permits the regulation of weights and measures as a branch of the police power and since that prohibition is clearly detrimental to the public welfare, which alone would justify and authorize the regulation of the appellant's business, the police power does not authorize the regulation here assailed. The unreasonable discrimination against the appellant's method of doing this business therefore not only results in the loss of liberty and property of the appellant but also acts to the detriment of the public.

For another reason the burden on the local dealer and the appellant *is not the same.* As pointed out above, the operator of a coal yard in Chicago may be licensed as a

public weighmaster and do his own weighing in his own yard, that is, at the point of original weighing. However, there is no provision for licensing weighmasters outside of Chicago, which is the point of original weighing for coal trucked direct to the consumer. This discrimination goes right to the heart of this case. Prior to the year 1935 the Morris Coal & Mining Company, the seller of the coal here involved, had a license as a public weighmaster. The City of Chicago refused to renew this license on the ground that the scale at the mine was not located in Chicago. It is a fair inference from this record that the real reason that this weighmaster's license was refused on the ground of non-residence was that coal trucked from Morris was becoming a competitive influence in the Chicago market.

The Supreme Court of Illinois, in its majority opinion, cited the case of *State* v. *Nelson*, 66 Minn. 166, 68 N. W. 1066, which held that the City of Minneapolis had the right to inspect dairy cattle located outside the city as a condition precedent to permitting the sale of milk within the limits of the city. That case did not hold that a city could prevent the sale of milk from uninspected cattle and at the same time refuse to inspect the cattle. That, in effect, is what the ordinance here complained of attempts to do. If two different methods of doing a coal business are to be properly treated alike *in being required to weigh coal under the same ordinance* then it is apparent that the ordinance is invalid because it does not permit the equal privilege of becoming a weighmaster *at the point of original weighing.* It unlawfully discriminates against the person who must in the first instance weigh his coal outside the city limits.

It is no answer to this contention to say that the Chicago Inspector of Weights and Measures has no jurisdiction

outside the City of Chicago, because in the case of *Hill* v. *Fetheroff*, 236 Pa. 70, 80 Atl. 677, citing with approval *State* v. *Nelson, supra,* relied upon by the Illinois court, it was held that a municipal officer has the right to make inspections outside of his own city where the inspection is voluntarily submitted to as a condition to doing a certain business within the municipality. Here the City of Chicago makes no offer to extend to the nearby mine, under any circumstances, the privilege which it offers the local dealer; yet it attempts by this ordinance to require the mine to comply with the burdens of the ordinance while denying it the benefits which would permit it to comply with the ordinance in a fair and reasonable manner.

Counsel for the City have heretofore attempted to meet this argument by the suggestion that there is nothing in the ordinance to prevent a downstate coal company from establishing an agent in Chicago as a public weighmaster. This obviously does not lighten the burden imposed by the ordinance on appellant's business. So long as it is necessary in order to comply with the ordinance to unload and reload the coal in the City of Chicago, the appointment in Chicago of an agent as a public weighmaster would not in any way aid appellant; if he must unload his truck in order to comply with the ordinance it makes no difference whether his agent or some other person performs the slight physical act of balancing the beam and reading and certifying the weight as a public weighmaster.

Appellee's further suggestion that the ordinance can be complied with by any legitimate dealer or trucker because the cost of a public weighmaster's certificate is but twenty-five cents per load falls into the same category. It is not the amount of the weighmaster's fee which is objectionable but the method of weighing which requires dumping and rehandling of the load in order to get the certificate.

The appellee's argument that appellant can establish a coal yard in Chicago to avoid the burdensome operation of the ordinance on his business is the same as that made by the Supreme Court of Illinois. It simply means that the public is to be deprived of the savings inherent in appellant's business and the only way he can comply with the ordinance is to go out of his present business and go into an entirely different sort of business. This "solution" neither meets nor answers the question presented. *It is clearly unnecessary to compel a man to establish a coal yard in order to verify a mine weight.*

We submit that the ordinance in question, as applied to the business of trucking coal from mine to consumer after weights have been determined at the mine in accordance with State statutes, is discriminatory in its operation and an unnecessary and unreasonable exercise of the police power. As such, it is unconstitutional and void under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

THOMAS C. MCCONNELL,
IRWIN T. GILRUTH,
OWEN RALL,
Counsel for Appellant.

Chicago, Illinois,
November 14, 1936.

FILE COPY

DEC 8 19

CHARLES ELMORE CR

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1936.

No. 175

MARCUS HAUGE,

Appellant,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

Reply Brief and Argument for Appellant.

IRWIN T. GILRUTH,
THOMAS C. McCONNELL,
231 South La Salle Street,
Chicago, Illinois.

OWEN RALL,
135 South La Salle Street,
Chicago, Illinois
Counsel for Appellant.

CHICAGO LAW PRINTING CO., 111 N. WACKER DRIVE (COR. WASHINGTON ST.) TEL. FRANKLIN 6521

INDEX.

PAGE

SUBJECT INDEX.

Answer to Appellee's Statement of the Case 1
Argument 3

I.

The purpose sought to be accomplished by the ordinance 3

II.

The reasonableness of the ordinance is subject to judicial determination. The ordinance is unreasonable.. 8

III.

The cases cited by appellee support our contention that the ordinance violates the Fourteenth Amendment.... 16

TABLE OF CASES CITED.

Austin v. Atlanta, 28 Ga. App. 702, 113 S. E. 113..... 24
Brittingham v. City of Sparta, 157 Wis. 345, 147 N. W. 635 31
Charleston v. Rogers, 2 McCord 495, 13 S. Car. Rep. 293 ..... 19, 31
City of Cartersville v. McGinnis, 142 Ga. 71, 82 S. E. 487 23
City of Chicago v. Kautz, 313 Ill. 196..... 7

PAGE

City of Chicago v. Wisconsin Lime & Cement Co., 312 Ill. 520 3
City of Cincinnati v. Broadwell, 3 Ohio Dec. Repr. 286 30
City of Lamar v. Weidman, 57 Mo. App. 507 29
City of Raleigh v. Sorrell, 46 N. C. 49 29
City of St. Charles v. Elsner, 155 Mo. 671, 56 S. W. 291 28
Collins v. City of Louisville, 41 Ky. Rep. (2 B. Mon.) 134 26
Davis v. Town of Anita, 73 Ia. 325, 35 N. W. 244 25
Funk v. United States, 290 U. S. 371 16
Gaines v. Coates, 51 Miss. 335 27
House v. Mayes, 219 U. S. 270 18
McLean v. Arkansas, 211 U. S. 539 18
Miller v. Town of Virden, 16 Man. 479 33
Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405 ..... 3, 14, 16
O'Maley v. Borough of Freeport, 96 Pa. 24 30
Petty v. State, 102 Ark. 170, 143 S. W. 1067 23
Pittsburg & S. Coal Co. v. Louisiana, 156 U. S. 590 18
Snyder v. Massachusetts, 291 U. S. 97 16
State v. Smith, 123 Ia. 654, 96 N. W. 899 26
State ex rel. Barker v. Merchants Exchange, 269 Mo. 346, 190 S. W. 903, affirmed 248 U. S. 365 28
State ex rel. Stone v. Eck, 121 Minn. 202, 141 N. W. 106 27
Stokes & Gilbert v. City of New York, 14 Wend. 87 29
Sylvester Coal Co. v. City of St. Louis, 130 Mo. 323, 32 S. W. 649 27
Taylor v. Anderson, 40 Okla. 316, 137 Pac. 1183 30
Taylor v. Pine Bluff, 34 Ark. 603 21
Vega S. S. Co. v. Consolidated Elevator Co., 75 Minn. 308, 77 N. W. 973 26
Wills v. City of Fort Smith, 70 Ark. 221, 66 S. W. 922 .. 22
Yates v. City of Milwaukee, 12 Wis. 673 31

PAGE

Ordinances Cited.

Revised Chicago Code of 1931:
Section 2947 6
Section 3342 ..... 6, 7

Textbooks Cited.

Dillon on Municipal Corporations (5th ed.), Sections 709 and 710 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1936.

No. 175

MARCUS HAUGE,

Appellant,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

Reply Brief and Argument for Appellant.

Answer to Appellee's Statement of the Case.

In appellee's brief an attempt is made to restate the case and make it appear that the coal involved in this controversy was not properly weighed. The record is clear that the coal was weighed in accordance with the State statutes regulating weights and measures in force at Morris, Illinois, where the weighing took place (Rec. 14, 18). A delivery ticket was furnished in accordance with these regulations by the Morris Coal and Mining Company (Rec. 11). The coal was sold through the efforts of Burgess, a broker or dealer for the Morris Coal & Mining Company, in Chicago (Rec. 19). The business involved is, as

stated in the appellant's brief, that of trucking coal direct from mine to consumer (Rec. 19, 20) and the fact that a broker or dealer takes the original order from the customer is immaterial for the reason that the coal does not come to rest in transit between mine and consumer. It is, of course, admitted that the ordinance complained of has been violated, and the whole point of appellant's argument is that since the ordinance is unconstitutional it need not be complied with.

While it is true, as stated on page 7 of appellee's brief, that there are no "complaining mining companies" as parties to this record, it must be apparent to the Court that this is a test case. The only way the constitutionality of this ordinance can be tried out in the courts is through contesting on the grounds assigned as error on this appeal, the arrests and prosecutions of the truckers carrying the coal. We submit that the record amply sustains the statement of facts which appears in appellant's brief.

ARGUMENT.

I.

The Purpose Sought to be Accomplished by the Ordinance.

We have already pointed out that the original purpose sought to be accomplished by this ordinance was to provide an original weighing of coal sold from coal yards which had been dumped as an indiscriminate mass in the yard (Appellant's Brief, p. 27). (*City of Chicago* v. *Wisconsin Lime & Cement Co.*, 312 Ill. 520.) The business here involved is a different business than that originally regulated by the ordinance. Neither the court below nor appellee's brief give any weight to the essential fact that the appellant's business to be regulated is now, because of nation wide changes in methods of transportation, an entirely different problem than operating a local coal yard.

The opinion below and the appellee both assume that because the regulation is reasonable as to a local coal yard, it is reasonable as applied to different facts.

This is contrary to *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, where in an opinion by Mr. Justice Brandeis this Court stated (p. 415) three rules applicable here:

> First—"A statute valid as to one set of facts may be invalid as to another."
>
> Second—"A statute valid when enacted may become invalid by change in the conditions to which it is applied."
>
> Third—"The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably."

That case involved allocation to railroads of the expense of highway grade separations and the Court recognized (p. 416) the recent "revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles." The case at bar presents another example of a regulation having become invalid and unreasonable because of that very change. Although it be true that our complaint arises out of a "method of transportation" which we have voluntarily adopted, yet that does not justify evasion of determining the reasonableness of the regulation here challenged *as applied to present conditions,* because the method of transportation is widespread, efficient, economically sound for hauls of the length involved here, and is perfectly lawful.

Although it held the ordinance to be reasonable, the Supreme Court of Illinois based its holding practically on the sole ground that since the regulation was reasonable as applied *to other facts* (*i. e.,* a local coal yard), it was also reasonable as applied to the different facts here presented. The appellee's brief falls into the same error and in addition erroneously argues that this court may not consider the reasonableness of the ordinance.

On page 14, appellee refers to the statement of the court below that the fact that the coal was weighed on State-tested scales is immaterial. That statement is true only if this ordinance be held valid, but, as we contended in our brief (pp. 23-24), it was error for the court below to *ignore* the fact of a previous weighing at the mine and to ignore the existence of other laws and ordinances *in determining whether this ordinance is valid as applied to the situation existing here.*

In appellee's argument under this heading a discussion is indulged concerning the practice of double weight tickets. We suggested in our brief (p. 18) that a delivery ticket

might be required without constitutional objection. The appellant's quarrel with this ordinance arises by virtue of the method of weighing required by the ordinance. If, as we suggested, the official tare weight might be obtained after dumping the coal at the customer's residence, this procedure would equally as well as the present ordinance protect the customer from padded or false weight tickets. The weighing itself could, as we pointed out, be done by a public weighmaster and the whole force of appellee's argument on double tickets would be as well met by the suggested reasonable procedure, as by the present unreasonable one. Our position is that it is clearly unnecessary to compel the dumping of a load in transit to protect a customer from the evils, fancied or real, which are suggested by the appellee and that in fact the weighing of the truck after delivery is no more subject to abuse than the method now required by the ordinance.

Since the customer must be furnished with a delivery ticket both under state statute and under city ordinance, irrespective of the city weighmaster's certificate, the "double ticket evil" would be as effectively prevented by obtaining the tare weight of the vehicle on the scales of the public weighmaster after the coal is unloaded at the residence of the purchaser, as it is if obtained before delivery to the purchaser. The only protection of the present ordinance against the double ticket scheme elaborated in appellee's brief is that the public weighmaster is bonded. His bond would be just as effective as an instrumentality of enforcing his honesty if the tare weight were obtained after the coal was unloaded at the premises of the purchaser as it is effective now in enforcing his honesty when the tare weight is to be obtained before loading the vehicle. Not a single one of the supposed evils which appellee refers to is any more likely to occur if the tare weight is obtained

after than if it is obtained before. Since the present ordinance is no better fitted to meet the evils than the method suggested by the dissenting judges of the Illinois Supreme Court, the appellee's argument that the burden imposed by the present ordinance of unloading the coal at the scales in order to obtain the tare weight before delivery is *necessary* to meet the evils which appellee parades in its brief, must fail.

On page 15, appellee contends that the state statute referred to in our original brief (p. 8) and set out in full in appellant's printed jurisdictional statement (p. 9), requiring a delivery ticket to be given to the purchaser, is ineffective to prevent "double tickets" because the ticket is not required to be given to the purchaser before removal of the coal from the truck. If that statute is inadequate to meet that problem as contended, the City of Chicago has effectively and sufficiently supplemented the statute by Section 3342 of the Revised Chicago Code of 1931 (Rec. 33-34) which requires this delivery ticket to be delivered to the purchaser "at the time of the delivery of the fuel *and before such fuel or any part thereof is removed from such vehicl*" This delivery ticket is *in addition* to the weighmaster's certificate required by Section 2947 (Rec. 29) involved in this appeal. In view of Section 3342 of the ordinance, the "double ticket" evil is as well met by having the *additional* weighmaster's certificate (containing the gross, tare and net weights of the load) delivered to the purchaser after unloading the coal and before payment, as before unloading the coal. Delivery of the delivery ticket before unloading meets the evil discussed; delivery also of a weighmaster's certificate at that time is unnecessary.

On page 16, appellee makes the startling argument that the latter portion of Section 3342 requiring a reweighing

of coal on demand, although contained in the 1931 revision of appellee's ordinances, is in truth unconstitutional and was held to be void in *City of Chicago* v. *Kautz,* 313 Ill. 196, decided in 1924. In the present case, however, the court below (at the insistence, incidentally, of the appellee—see its brief in the court below, Rec. 102) held (Rec. 48-49) that its holding in the *Kautz case* was limited to declaring void that part of a section (which is now Section 3342) which permitted a city inspector to require a reweighing of coal *that had been weighed by a public weighmaster.* That court has not held that the section is void as applied to coal coming into Chicago without being weighed on a public weighmaster's scale and our original contention still stands that the power given by Section 3342 to the customer and to the inspector of weights and measures to require a verification of the weight of a load of coal must be recognized in determining the reasonableness of requiring—as applied to our facts—the unloading of coal at the scales to obtain a verification of the mine weight. The appellee having re-enacted Section 3342 in 1931, although the *Kautz case* was decided in 1924, and having limited the *Kautz case* in the court below, ought not to be permitted here to stultify itself by arguing that the section is unconstitutional as applied to a situation not presented to the Illinois court in the *Kautz case.*

The statement at the bottom of page 16 of appellee's brief that if the ordinance now attacked be held unconstitutional "there will be nothing left in so far as truckers like Hauge are concerned but an empty prohibition of short weighing and a meaningless penalty" is nothing short of absurd. The power would remain to pass a reasonable ordinance to replace the unreasonable one here under review.

On page 17 of its brief, appellee says this Court may not "substitute its judgment for that of the municipal legisla-

tive body." The cases referred to later, cited under Point III of appellee's own brief, hold, contrary to this statement, that the reasonableness of a regulation enacted under the police power is subject to judicial review. If this were not true constitutional safeguards would be meaningless words without sanctions enforcing them.

In so far as the City honestly protests against false weights, we concur. There is no issue between us on that point. It is the fact that the method proposed to curb these dishonest practices imposes a burdensome and unnecessary charge upon the customer which the City ostensibly wishes to protect that brings our objection. In the instant case the city inspector did not attempt to weigh the load (Rec. 14). He knew the weights were right (Rec. 14). But by means of arresting the trucker on the charge of not having a weight certificate the City either imposes the burden of dumping and reloading the coal or prohibits the delivery of the coal. It is the technical weighing procedure necessary to obtain a weighmaster's certificate which constitutes the vice of the situation. Nor does the appellant complain about the requirement of a bond of $2,000, or the certifying of scales if he could be licensed as a public weighmaster at the point of original weighing, or even of the requirement that he be licensed as a public weighmaster in Chicago if a reasonable method of weighing were permitted that did not involve dumping the load and reloading before delivery to the customer.

II.

The Reasonableness of the Ordinance is Subject to Judicial Determination. The Ordinance is Unreasonable.

We have pointed out in our original brief (p. 17) that even though the object of a statute or ordinance be within

the police power the method used to accomplish the object must be necessary and reasonable.

Appellee, without meeting these cases squarely and without really arguing that the ordinance is reasonable, attempts to dodge the issue by citing twenty-four cases under Point II of its brief to the general effect that this Court may not concern itself with the wisdom of legislation. That is, of course, too clear for argument. Equally clear it is that when a regulation of a legitimate business, under the guise of the police power, is extravagantly unreasonable and is unnecessary, the Court will not hesitate to declare it void.

Appellee contends that our appeal is an effort to substitute our judgment for that of the City Council as to the kind of an ordinance which should govern truck shipments of coal into the City of Chicago. Not at all. We have pointed out the existence of reasonable methods of accomplishing the end *ostensibly* sought to be accomplished by the City only because the existence of such reasonable methods has a direct bearing on the important question whether the present harsh and burdensome regulation is *necessary*. Obviously, a regulation which is *of necessity* harsh may be justified constitutionally while at the same time a regulation could not be sustained which is harsh not of necessity but because of an *arbitrary* refusal to adopt less burdensome but equally effective alternatives. We and the dissenting justices of the court below contend that the ordinance involved here falls in the latter class and is invalid.

The suggestion of the dissenting justices permitting the weighing of the empty vehicle after delivery and our suggestions as to a method of weighing are referred to by appellee as a "suspicious syllogism" (Appellee's Brief,

p. 21). This statement is elaborated on by a further discussion on pages 22 to 24 of appellee's brief. If the arguments there presented are analyzed their specious nature is at once apparent.

Without indulging in conjecture as to the accuracy of the supposititious weights used by counsel for which there is no record basis, we wish to point out that all they have stated is that a dishonest trucker can by manipulation of various objects increase his tare weight. However, a tare weight including standard articles of permanent equipment can be stenciled on the truck, and if any of the equipment is taken off in transit from the mine to Chicago this would become apparent upon a weighing of the gross load, because the Chicago weight would not agree with the mine weight. There would be no incentive for the trucker to depart from his stenciled weight at the time of his mine weighing because he is paying the mine for the difference between his stenciled tare weight and the gross amount of his load. If he decreases his tare weight he obviously pays for more coal than he actually receives. His every interest on his original weighing at the mine would be to insure that his tare weight did not vary from the stencil shown on his truck, because he is charged for the difference between the tare and the gross weights. Now, if after having a weighing he desires to short weight his customer, he can do it as easily in Chicago after leaving a Chicago coal yard as he can between Morris and Chicago. *Short-weighing the customer after obtaining an original weighing is something that the ordinance complained of does not purport to prevent.* (See Appellee's Brief, pp. 29-31). That is covered by other sections of the ordinance.

The further suggestion that in slushy weather the tare weight of the truck would vary because of the ice picked up on the running gear is equally untenable. The gross

weighing in Chicago should normally show a higher gross weight under such conditions than that shown on the mine scales. If a dishonest driver attempts to estimate the amount of this over-weighing and could accurately do so, he could possibly abstract approximately a dollar's worth of coal from a five-ton load without detection. But he could do the same thing in driving over the slushy streets in the City of Chicago because, as pointed out, there are over three thousand miles of streets in which he could pick up a load of slush on his running gear. Furthermore, it is inconceivable that a driver would run the risk of a $200 penalty and take the burden of unloading 500 pounds of coal for the possibility of obtaining a dollar's worth of coal by short-weight. We submit, therefore, that there is no suggestion made as to a method of short-weighing which is not equally applicable to the method of weighing required by the present ordinance.

The answer made to our second suggestion—of permitting the tare weight of the truck to be obtained *after delivery of the coal*—is equally false and misleading. Let us analyze the illustration given by appellee at page 24 of its brief. Counsel assume the tare weight of a truck and equipment at the scales at 9,000 pounds and that it contains 9,000 pounds of coal. This gives a gross weight of 18,000 pounds, which would be shown on the weighing in Chicago. The trucker then drives away, delivers his coal and returns to the scale for weighing of his tare weight. Now, if he is honest, his weight will be correct, except for the possible variation of one per cent which the law allows.

The appellee's elaborate argument is perverted by its determined but unjust assumption that (a) the dealer, (b) the truck-driver, and (c) the bonded weighmaster are all to be dishonest.

Appellee's argument further assumes that the present ordinance requires—which it does not—that the public weighmaster of a local dealer keep the driver under constant surveillance from the time the driver weighs his empty truck until the gross and net weights are obtained. It also further assumes that the non-resident truck-driver will be equipped with elaborate means of varying the tare weight of his truck which would be less easily discoverable than similar devices stored inside a local coal yard—an assumption which is sharply in conflict with logic.

Appellee says that the non-resident truck-driver can take off two spare tires (200 pounds), tow chains (80 pounds), sideboards (350 pounds), dividing boards (300 pounds), and can consume ten gallons of gasoline (80 pounds), or a total weight of 1010 pounds, before returning to the scales for a check of the tare weight. After all this effort the trucker has short-weighted his customer, on counsel's figures, $2.00 worth of coal. The ten gallons of gasoline he has to dispose of are worth approximately $1.50 and he has to find a place to hide his tow chains and his sideboards and spare tires in the process. All of this must be done out on the streets in Chicago, and since the trucker delivers coal all over the city it would assume a number of hide-outs for storing this equipment in the city while the trucker returns to the scale for a check of his tare weight.

Let us assume that this same dishonest driver wanted to pursue this scheme while working for a Chicago coal yard and wished to obtain a public weighmaster's certificate, as called for by this ordinance, before delivering his coal. He can obtain his own yard if he gets a scale and can be licensed as a public weighmaster and do the weighing himself. There are no inspectors present in his own yard. He weighs his tare weight without the two spare tires (200 pounds), without the tow chains (80 pounds), without the

sideboards (350 pounds), without the dividing boards (300 pounds), and has his gas tank practically empty. His tare weight would show 7990 pounds. He then drives to the gasoline pump and fills up with gasoline (80 pounds), puts on his two spare tires (200 pounds), his tow chains (80 pounds), his sideboards (350 pounds), and his dividing boards (300 pounds). He then puts on 9,000 pounds of coal and returns to the scale for a gross weighing and gets a figure of 18,000 pounds. The tare weight subtracted from the gross weight gives him a net weight of 10,010 pounds, and his *public weighmaster's certificate,* in accordance with the ordinance, will show a delivery of five tons of coal, whereas the purchaser in fact will receive only four and a half tons. All of this process of short-weighting is done within the secrecy of his own coal yard and is obviously more easily accomplished than the method of short-weighting suggested by counsel, which must take place openly on the city streets of Chicago. The City further says that the protection afforded a customer by this ordinance is that the short-weighting will not take place in the yard because the weighmaster is bonded in the amount of $2,000 and has his good will to customers to consider. Of course, the good will to customers is common no matter who is in the business and the matter of posting a $2,000 bond has never been objected to by the appellant, if the ordinance would permit a method of weighing which would obviate the burdensome and unnecessary charge in handling and dumping the coal. If the appellant owned a coal yard and had posted a bond he would still have had to dump coal in his own yard after trucking it from the mine in order to obtain the tare weight, or weight of the empty vehicle, before unloading his coal on the premises of his customer. This requirement of ascertaining the tare weight first is the vice of this ordinance.

It is apparent that the City's argument and illustration are an attempt to lead the Court away from the true issue, which is that the onerous method of weighing required by the ordinance is unnecessary to prevent short-weighting and is unreasonable in that it imposes an extra charge for rehandling the coal which is out of all proportion to any possible benefit gained by the consumer. After the laborious working out of figures not substantiated by the record, the appellee has made out a hypothetical case of short-weighting that would result in a quarter-ton shortage, which would result at the most in a half-ton shortage in a five-ton load and a loss of $2.00 on a five-ton load to the consumer defrauded. The cost to the consumer of reweighing this coal in each and every instance, whether delivered by a dishonest driver or an honest driver, is from 50c to $1.00 a ton, or from $2.50 to $5.00 on the average load. The question asked by this appellant is whether or not it is reasonable for the City of Chicago to impose this charge on a consumer on the hypothetical theory advanced here, when the same method of short-weighting can be carried on by a dishonest coal dealer or trucker while yet obtaining a weightmaster's certificate as required by the present ordinance.

As pointed out by this Court in the case of *Nashville, C. & St. L. R. Co.* v. *Walters,* 294 U. S. 405, at page 429:

> "But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured."

All that appellee's figures prove in the instant case is that there is a greatly disproportionate detriment to the buying public in the application of this ordinance to the

business involved with no corresponding benefit to the consumer. By their own figures counsel have proved that the ordinance is exacting a toll from the consumer of from $2.50 to $5.00 for *every* average load under the theory that the consumer should be protected from the *occasional* case of dishonesty which might involve a cost to the consumer at the most of $2.00 on the same load of coal. As we pointed out in our original brief, the interest of the consumer is in his pocketbook and since he must pay a charge of this kind for protection against a practice which is equally possible under the present ordinance the unreasonable nature of the regulation is obvious and apparent.

The cases cited by the appellee from pages 26 to 33 have no application to a situation such as is presented here, and an examination of the language used in them shows in each and every instance that the reasonableness of an exercise of the police power is always open to the scrutiny of the courts. If this were not so no case could ever be brought to this Court to review whether or not a state has transgressed the constitutional prohibition invoked by this appellant.

We do not comment in detail on the twenty-four cases cited by appellee under Point II because the *general rule* upon which we rely is well established by the cases on page 17 of our original brief and the cases cited by appellee under Point II are not helpful in determining the validity of the *particular ordinance* involved here.

On page 33, the appellee quotes Mr. Justice Herrick of the Supreme Court of Illinois to the effect that:

> "The circumstance that has brought about the controversy here is, after all, one of transportation."

This change in transportation referred to has arisen since the passage of the ordinance, and while an ordinance may

be reasonable and therefore valid at one time or under one set of circumstances, it may be unreasonable and therefore invalid under different circumstances. A statute may be perfectly valid on its face, yet under a given state of facts disclosed by evidence be invalid. While the fundamental principles of the organic law of the nation remain unchanged, their application to changing conditions must and does call for a restatement of ancient and obsolete rules.

Snyder v. *Massachusetts,* 291 U. S. 97.
Funk v. *United States,* 290 U. S. 371.

The rule upon which we rely is clearly stated in the case of *Nashville, C. & St. L. R. Co.* v. *Walters,* 294 U. S. 405 (at page 415):

> "A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably."

III.

The Cases Cited by Appellee Support Our Contention That the Ordinance Violates the Fourteenth Amendment.

We agree with appellee's brief (pp. 33-34) that the sole question before this Court is whether the ordinance here involved violates Section 1 of the Fourteenth Amendment in denying to appellant the equal protection of the laws or in depriving him of liberty or property without due process of law.

We also agree that if the ordinance is a legitimate use of legislative power it is not unconstitutional.

We contend that the ordinance is so *plainly* and *unnecessarily* burdensome that it is unconstitutional. We shall show that while no other case has passed on the requirement involved here the inferences to be drawn from the very cases cited by appellee under its Point III prove that the requirement here is invalid and that the very absence in 125 years' of American cases on the regulation of weights and measures of cases dealing with such a harsh requirement indicates strongly that imposing the harsh requirement of the present ordinance has never before been attempted. This very lack of cases is persuasive of the unreasonableness of the requirement.

Appellee cites thirty-five cases on pages 33 to 47 of its brief. Not one holds to be reasonable a requirement that a loaded vehicle being weighed by a public weigher must be unloaded and reloaded at the scales before being unloaded at the purchaser's premises. In the present ordinance that requirement is imposed with respect to coal coming from the mines by truck through the device of requiring a weight certificate of an official weighmaster (in addition to the dealer's delivery ticket) to be delivered to the purchaser *before the load is unloaded on the purchaser's premises* and of then refusing to permit a weighmaster to certify the tare weight of the truck except by weighing it empty shortly before weighing it full.

The cases decided by this Honorable Court on pages 35 to 38 of the appellee's brief do not concern requirements such as that involved in the case at bar, and while some of them deal with the general subject of the regulation of weights and measures (which we have always conceded is a proper subject for reasonable regulation under the police power), the most that can be said for them is that they state well established general rules of constitutional law which really require no such extended citation of au-

thority because we have not disputed the existence of such rules.

However, we call attention to certain quotations in the cases which seem to us to be contrary to the contention of the appellee to the effect that the reasonableness of the ordinance is not subject to judicial review.

In *McLean* v. *Arkansas,* 211 U. S. 539, this Court said (p. 547):

> "It is also true that the police power of the state is not unlimited, and is subject to judicial review; and, when exerted in an arbitrary or oppressive manner, such laws may be annulled as violative of rights protected by the Constitution."

In *House* v. *Mayes,* 219 U. S. 270, the Court said (p. 282) that the means by which the police power of a state is exercised shall be devised by the state, "taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own Constitution or the Constitution of the United States."

The statute in *Pittsburg & S. Coal Co.* v. *Louisiana,* 156 U. S. 590 (cited on page 36), enforced a system of gauging coal equally applicable to all coal coming by boat although it made no such regulation of coal coming by land. This Court held that there were differences in transportation by boat and by land which justified regulating one and not the other. In our case, we are asking for a different regulation of coal coming into Chicago by truck direct to the consumer than is applied to coal coming by railroad to a local coal dealer and thence to the consumer by truck. The right and duty of the City of Chicago to recognize

inherent differences in situation caused by differences in methods of transportation are clearly shown by the case cited, which case clearly rebuts the holding of the court below to the effect that recognizing such inherent differences would be discriminating *in favor of the appellant.*

While ordinarily the complaint that legislation is discriminatory so as to deny equal protection of the law is directed against a statute which recognizes differences in the objects of the regulation and regulates them with varying provisions, the complaint here is largely the converse, namely, that the City of Chicago is attempting to apply the same requirements to two radically different methods of doing business. The *Pittsburg Coal Co.* case just referred to is ample justification for a recognition by the City in regulating the coal business that the method of transportation is an important factor in determining the reasonableness of a regulation. As we have already pointed out, a regulation reasonable as to one set of facts may become unreasonable where because of economic changes (in this case the coming of truck transportation due primarily to the building of hard roads) a new set of facts comes into being.

On page 38 of appellee's brief it is stated that

> "Statutes and ordinances *such as the one before the Court* which seek to protect buyers by requiring that certain commodities be weighed upon public (or licensed) scales, by public (or licensed) weighers, are common and have regularly and generally been upheld as valid police regulations." (Italics ours.)

This assertion we emphatically dispute. The earliest ordinance referred to in the digest of cases contained in appellee's brief (pp. 38-48) was passed in 1810 (*Charleston v. Rogers,* 2 McCord 495, 13 S. Car. L. Rep. 293). An

examination of the statutes and ordinances attacked in the one hundred twenty-five years since 1810 discloses not a single ordinance or statute the effect of which was to require coal coming into the city loaded in a vehicle to be unloaded in order to be weighed, before delivery to the purchaser. Such a procedure is so repugnant to elementary ideas of justice that the very absence of cases dealing with the requirement such as the City of Chicago seeks to enforce in the present case is itself strong evidence that no such requirement has ever before been attempted.

Most of the authorities cited by the appellee are irrelevant. It is plain that the citation of these irrelevant authorities is intended to obscure the real issue—whether the requirement involved here is a *reasonable* one. Instead of arguing that the requirement is reasonable, the appellee takes the indefensible position that this Court cannot inquire into the reasonableness of the ordinance because, forsooth, the regulation of weights and measures is in the exercise of the police power. Appellee's own cited cases are contrary to that assertion.

We have read with care the numerous authorities cited on pages 38 to 48 of appellee's brief. Many of them are obviously irrelevant on the face of appellee's brief. Several, moreover, are distinctly favorable to the appellant. Before we point out the authorities cited by the City which are affirmatively helpful to the appellant's cause, we state without fear of successful challenge that not a single one of the authorities referred to at such length by the appellee dealt with any requirement such as the City of Chicago seeks to impose by ordinance in this case. Rather, the authorities cited by the appellee go clearly to the point that while the regulation of weights and measures falls within the appellee's general powers, the regulations must be *reasonable.*

On page 38 appellee cites Dillon on Municipal Corporations (5th ed.), Sec. 710. We refer the Court to the preceding section, Section 709, which in the earlier editions of this treatise was Section 390, frequently referred to in the cases cited by the appellee. Section 709 says:

> "Laws requiring articles to be inspected or weighed and measured before being sold are in the nature of police regulations, and are valid in the absence of special constitutional provisions. *When reasonable in their nature,* they are not regarded as being in restraint of trade." (Italics ours.)

We now proceed to the cases cited.

In *Taylor* v. *Pine Bluff*, 34 Ark. 603, the court declared void an ordinance requiring the weighing of cotton on a city scale for a fee of twenty-five cents per bale on the ground that the ordinance was intended to produce revenue. No contention was made or passed upon in that case respecting the reasonableness of the method required by the ordinance of ascertaining the weights. The court said, in part (pp. 608-609):

> "The court did not err in holding that the city had power to pass, and enforce by proper penalties, an ordinance of this nature. But, *being a police regulation, it must not be unreasonable* nor directed to the end of raising a revenue. Of course, the city council must first judge of what may be reasonable, and what fees will fairly compensate for the costs and expenses of the system, without regard to revenue. The courts will respect any fair exercise of this discretion, and will not be nice to take new accounts of expenses and correct small excesses. But the police power is too vague, indeterminate and dangerous to be left without control, and *the courts have ever interfered to cor-*

rect an unreasonable exercise or mistaken application of it." (Italics ours.)

In that case the lower court had undertaken to restrain the collection of that portion of the fee in excess of fifteen cents and the Supreme Court of Arkansas held that to be erroneous and itself declared the ordinance void without prejudice to the right of the city "to pass reasonable ordinances to provide for the weighing of cotton, or other things offered for sale; and to make the same compulsory with the payment of a reasonable fee" (pp. 609-610). A similar order should be entered in the present case, leaving the City of Chicago free to enact a reasonable ordinance covering the verification of mine weights of coal coming by truck into the City of Chicago. The portion of the opinion just quoted emphasizes the fact that the issue in the present case is not one between the present ordinance and the absence of all regulation, but is one between the present ordinance and some reasonable ordinance which the City of Chicago has the power to enact.

Wills v. *City of Fort Smith*, 70 Ark. 221, 66 S. W. 922, cited on page 39 of appellee's brief, was a case in which two of the five judges of the Arkansas Supreme Court dissented (p. 225) "on the ground that the ordinance in question is unreasonable and oppressive, and therefore void." It is noteworthy that the majority *considered and decided the reasonableness of the ordinance.* The attack there made on the ordinance was the fact that the official scale operated during the summer months, when little coal was sold, was ten blocks from the plaintiff's yard. The court held (by a three to two vote) that since during the winter months, when much coal was sold, the city operated two scales, one of which was near the plaintiff's yard, the ordinance was not unreasonable. There is not the slight-

est intimation in the opinion that it was necessary for the dealer in order to comply with the ordinance to unload his wagon at the city scale *before making the delivery to the purchaser.* In fact, it is apparent from a reading of the majority opinion that in order to comply with the ordinance it was not necessary for the dealer to unload his wagon at the city scale in order to ascertain the tare weight of the vehicle. Surely any such an extravagant requirement (as exists in our case) would have been denounced by the appellant in that case had it been required by the ordinance there involved. Two of the five judges held that mere distance of the city scales from the coal yard during the off-season was sufficient to condemn that ordinance as unreasonable. Surely had the dealer been required, in addition, to unload his coal each time at the city scales in order to comply with the city ordinance, the majority of the court would have held it to be unreasonable. In no view of the case does it tend to prove reasonable the Chicago ordinance which is involved in this case.

Petty v. *State,* 102 Ark. 170, 143 S. W. 1067, did not concern the reasonableness of the statute there involved nor did the case treat of methods of weighing cotton, which was the commodity there involved.

The two California cases cited on page 39 of appellee's brief have nothing whatever to do with the issue in the present case. They involved the right of city weight inspectors to receive salaries and the ordinances involved in those cases did not refer in any manner to public weigh-masters, but referred only to inspectors of weights and measures. We are at a loss to understand why they should be cited in the present case.

In *City of Cartersville* v. *McGinnis,* 142 Ga. 71, 82 S. E. 487, the court held an entire ordinance unconstitutional be-

cause Section 7 of the ordinance provided as follows (pp. 73-74):

> "It shall be the duty of the public weigher to determine all questions of tare or reduction from gross weights of any article weighed according to the custom of the trade, or as conditions necessary to fairness and justice require; and his decision shall be considered the fair and correct reduction. And, in all weighing, to furnish a certificate of tare, gross, and net weight thereof."

The court held that this section deprived the plaintiffs of property without due process of law and that for that reason the entire ordinance was unconstitutional. The question involved in our case was not raised in that proceeding, but it is significant that Section 7 itself related to the ascertainment of tare weights, which gives rise to the present controversy, and that the method of ascertaining tare weights provided by that ordinance was held unreasonable.

The ordinance involved in *Austin* v. *Atlanta*, 28 Ga. App. 702, 113 S. E. 113, permitted weighing "upon accurate scales of such dealer or of the party from whom he purchased or the official city scales, and certificate of such weight shall be delivered by said dealer to the purchaser." The defendant, in violation of the ordinance, estimated the weight of coal to be delivered to one of his purchasers without weighing it and was 1516 pounds short on a two-ton order. The court held that an ordinance requiring coal sold by weight to be weighed on a scale was valid—a proposition which is not an issue in the present case—but it did not deal with the question of the reasonableness of any provision approaching even remotely the drastic provision in the ordinance now under review.

The holding in *Davis* v. *Town of Anita*, 73 Iowa 325, 35 N. W. 244, is distinctly favorable to the appellant. In that case the ordinance provided that it should be unlawful to sell any commodity sold by weight within the Town of Anita when the quantity of the article exceeds one thousand pounds "without procuring a draft of such article or commodity to be made upon the city scales." The reasonableness of the method of ascertaining a tare weight was not there involved. But the language of the court, per Mr. Justice Seevers, is significant and helpful to the appellant here. The court said (p. 326):

> "This statute expressly confers on cities and towns the power to provide for the measuring or weighing of hay, coal, or any other article. The manner in which the power conferred shall be exercised is left to the discretion of the corporation; *subject, however, to the general rule that the ordinance must be reasonable.* The power given, in substance, is to regulate, and this implies that the corporation is empowered to do all things essential to the proper exercise of the power expressly conferred. The privilege conferred should not be confined within narrow bounds, but the discretion reposed in the corporation must be fairly exercised, so as to not unduly infringe upon the rights of the citizen, on the one hand, and yet, on the other, so that the express and necessarily implied object of the statute shall not be unduly limited." (Italics ours.)

And on page 327, the court said, "*It is conceded that the ordinance must be reasonable*", citing Dillon on Municipal Corporations (apparently the first edition), Section 319. In so far as the case has any relevancy here, it is authority for the proposition that this Court has the power to inquire into the reasonableness of the method sought to be imposed by the City of Chicago for the ascertainment of the tare

weight of the vehicle in which coal is brought into the City of Chicago for direct sale to one of its residents.

State v. *Smith,* 123 Ia. 654, 96 N. W. 899, did not involve any question of the reasonableness of a method of ascertaining the weight and there is no indication in the opinion of the court that the hay, straw, oats or corn required by the ordinance there involved to be weighed on city scales would have to be unloaded before delivery to the purchaser in order to determine the tare weight of the vehicle in which they were brought in to the city.

Collins v. *City of Louisville,* 41 Ky. Rep. (2 B. Mon.) 134, held invalid a fee ostensibly levied for the measurement of "stone coal". The court held that the fee was in reality a tax and invalid. It is interesting to notice that the court said (p. 135):

> "The ordinances provide for the measuring of carts by the city measurer, and the stamping of said measurement and the contents thereon, at the expense of the owner. It is declared to be unlawful for any person to haul lime or coal from the wharf without first having his cart or carts measured, and a penalty is denounced for a violation of this inhibition, etc. And an ordinance of 1832, still in force, ordains that the seller of lime and coal, sold at the city wharf, shall pay a tax on the same of one half cent for each bushel so sold, which would seem to include that sold in the boat by wholesale, as well as on that sold by retail."

The case has no relevancy to the question now before the Court, but the ordinance itself is an early, interesting indication of a reasonable method of determining the capacity of a vehicle.

In *Vega S. S. Co.* v. *Consolidated Elevator Co.,* 75 Minn. 308, 77 N. W. 973, the question here involved was not de-

cided. That case involved the weighing of grain at an elevator and the court held that the attempt to make the public weighmaster's certificate of weight conclusive is (p. 312) "the arbitrary exercise of power, so as to deprive a person of his day in court to vindicate his rights" and is unconstitutional.

In *State ex rel. Stone* v. *Eck,* 121 Minn. 202, 141 N. W. 106, the ordinance, as an alternative to requiring the commodities sold to be weighed by a public weighmaster, provided that nothing in the ordinance should prevent the parties from accepting the weight of the buyer if he were the owner of a scale and the seller was satisfied with the weight so ascertained. There was no provision in the ordinance there involved for the delivery of a certificate of net weight before the commodity was removed from the vehicle at the premises of the purchaser, so that the decision is not pertinent to a determination whether the Chicago ordinance here involved is a reasonable one. Nevertheless, the court did consider the reasonableness of the ordinance and it is clear from the opinion that coal sold in the City of Crookston did not have to be unloaded at the city scale in order to comply with the ordinance. The court said (p. 205):

> "This [ordinance], so far as the record discloses, imposes no hardship upon the fuel dealers of Crookston. Presumably the public scales are centrally located and readily accessible to all dealers. There is no showing to the contrary, even if it be conceded that inconvenience in this respect would be a potent factor in determining the reasonableness of the ordinance."

In *Gaines* v. *Coates,* 51 Miss. 335, the question involved in the present case was not discussed.

In *Sylvester Coal Co.* v. *City of St. Louis,* 130 Mo. 323,

32 S. W. 649, the ordinance provided that a dealer could be "a bonded weigher" and the only attack made on the ordinance there involved was that the city charged too much for the form of certificates furnished by it to such bonded weighers for the purpose of issuing certificates complying with the ordinance. The sole complaint made by the plaintiffs was that the charge for the certificates was an illegal tax. The reasonableness of the method of ascertaining the weights was not involved. That the question now before the Court was not determined by the Supreme Court of Missouri is clear from the following quotation from the opinion in that case (p. 321):

> "It [the ordinance] is to protect the citizen from being imposed upon by false weights and measures. To accomplish this purpose, while dealers in coal may weigh the coal which they sell on their own scales, they are not permitted to sell a wagon load of coal that has not been weighed by a weigher approved by the mayor and authorized by law to weigh the same."

In *City of St. Charles* v. *Elsner*, 155 Mo. 671, 56 S. W. 291, the ordinance prohibited a sale unless the load was weighed. The ordinance did not require the wagon to be unloaded prior to delivery to the purchaser. The appellant's contention was that the weigher's fee was a tax and that exempting transactions involving less than certain quantities was an illegal discrimination. The question involved in the present case was not decided.

In *State ex rel. Barker* v. *Merchants Exchange*, 269 Mo. 346, 190 S. W. 903, affirmed 248 U. S. 365, a statute prohibited private individuals and corporations from issuing weight certificates "of grain weighed at any warehouse or elevator in this State where duly appointed and qualified State weighers are stationed and in control of the scales

under the provisions of this article." The statute also prohibited the making of charges for any such weighing or for any such weight certificate. The method of weighing was not complained of as unreasonable and the question involved in the present case was not decided.

In *City of Lamar* v. *Weidman,* 57 Mo. App. 507, the court held that the subject of the ordinance (weights and measures) was clearly within the statutory power of the city but that a more difficult question was whether a section of the ordinance prohibiting others than the public weigher from charging a fee for weighing was unreasonable. The court held that such section was invalid, saying (p. 512):

> "The grounds upon which an ordinance may be declared void for unreasonableness have been repeatedly held to be where it is oppressive, unequal, unjust or altogether unreasonable."

Stokes & Gilbert v. *City of New York,* 14 Wend. 87, is an early case sustaining the validity of a city ordinance requiring coal to be sold by weight. The case did not decide whether any particular method of weighing the coal was unreasonable.

City of Raleigh v. *Sorrell,* 46 N. C. 49, is favorable to the appellant. The ordinance in that case provided (p. 50):

> "That all fodder, oats, hay and other provender sold in this market shall be weighed at the public scales, and the weigh-master shall give a certificate of the weight of the load, *and also of the cart or wagon when unloaded.*" (Italics ours.)

This clearly indicates that the wagon was to be weighed *after delivery* of the provender to the purchaser so that

the wagon did not need to be first unloaded at the city scale in order to comply with the ordinance. No complaint was made as to the method of weighing and the court held that the ordinance abridged no right of the defendant because selling his oats by weight he would have to have them weighed and it was a convenience to him to have them weighed in bulk by the city.

City of Cincinnati v. *Broadwell,* 3 Ohio Dec. Repr. 286, held that the city had no power to prohibit persons other than the city weigher from following "the business of weighing." The reasonableness of the ordinance there involved was not otherwise decided.

Taylor v. *Anderson,* 40 Okla. 316, 137 Pac. 1183, was a controversy between a county weigher and a municipal weighmaster as to whether the municipality had a right to create the office of municipal weighmaster. The court concluded (p. 205) that Oklahoma City might maintain a municipal scales in charge of a public weighmaster, but the case did not decide any question of the reasonableness of an ordinance regulating weights and measures.

O'Maley v. *Borough of Freeport,* 96 Pa. 24, was a bill in equity against the Borough to restrain the enforcement of an ordinance requiring the weighing of coal and the payment of five cents for each load delivered in the Borough. The trial court said in an opinion quoted with approval by the Supreme Court of Pennsylvania (p. 27):

> "The law, as gathered from all authorities, fixes as one of the essential qualities of a valid ordinance that it must be reasonable."

The Supreme Court of Pennsylvania held (p. 30):

> "The only limitation of this power is, that it must be exercised in a reasonable, lawful and constitutional manner."

That case clearly sustains the right of the court to determine the reasonableness of an ordinance.

In *Charleston* v. *Rogers,* 13 S. Car. L. Rep. 293, 2 McCord, 495, the only question was whether an ordinance requiring coal, including coal imported from Great Britain, to "be measured in a certain manner by the inspector of the city, at the expense of twenty-five cents a ton, to be paid to the inspector by the seller," was the imposition of an impost or duty on imports in violation of Section 10 of Article I of the Federal constitution. The reasonableness of the ordinance was not in issue; in fact, the method of measuring the coal was not even indicated by the opinion. The other South Carolina cases and the Texas cases cited on page 46 of appellee's brief are equally irrelevant.

Yates v. *City of Milwaukee,* 12 Wis. 673, sustained the power of the city to enact an ordinance requiring that a load of hay be weighed upon a city scale before being offered for sale. The method of weighing was not objected to and it does not appear from the opinion of the court that the hay would have to be unloaded in order to be weighed. Certainly, the method of ascertaining the tare weight of the vehicle was not the drastic method imposed by the ordinance involved in the present proceeding or complaint would have been made of it.

Brittingham v. *City of Sparta,* 157 Wis. 345, 147 N. W. 635, is helpful to the appellant. That case was an injunction suit to restrain the enforcement of a city ordinance, and the court held that if the ordinance were valid *in any particular* the bill would not lie. The ordinance was as follows (p. 347):

> "All coal offered for sale and delivered within the limits of the city of *Sparta,* except in carload lots, shall first be weighed at the public city scales of the city

of *Sparta* by the weighmaster, and such weighmaster shall give to the owner thereof a written ticket with his signature attached thereto of the quantity of coal contained in such load *upon the return of such wagon unloaded and weighed.*" (Italics ours.)

Thus it will be noticed that the terms of the ordinance were *entirely different* than those of the ordinance involved here. Express provision was made for weighing the empty vehicle *after delivery* of its load to the purchaser, whereas the vice of the ordinance of the City of Chicago here complained of is the requirement that the coal be unloaded at the scale in order to obtain the tare weigh of the vehicle *before the coal is delivered to the purchaser.* One of the objections made to the Sparta ordinance was that the plaintiff sold a large quantity of coal to farmers and others living outside of the city to whom delivery was made at the yard and that in order to comply with the ordinance such coal must be loaded on one of the plaintiff's wagons, hauled to the city scales and weighed, and then unloaded and reloaded on the purchaser's vehicle and the plaintiff's empty wagon weighed. In passing on this objection the Supreme Court of Wisconsin clearly indicated its belief that if the ordinance were thus construed it was invalid. The court said (p. 354):

"If the ordinance applies to sales made for consumption outside of the city, where delivery is made at the plaintiff's coal yard, it may be that it is unreasonably burdensome as applied to such sales. The plaintiff and other coal dealers in *Sparta* may come in competition with dealers in other places in making sales to farmers and others using coal some distance from the city. If the extra expense entailed by the ordinance is as great as is claimed, it might well prevent the *Sparta* dealers from meeting the prices made

by other dealers who are not handicapped by such a regulation. We are not at all certain, however, that the ordinance was intended to apply to cases where delivery is made to the purchaser at the coal yard and where the latter has the opportunity to observe the weighing of the coal which he buys. We do not decide the point, but hold that if the ordinance is invalid as to such sales it may still be held good as to sales made for consumption within the city and where the dealer hauls the coal sold from its yard and delivers it on the premises of the consumer."

The court further said (p. 354):

"They [dealers] are not obliged to suspend their business or to change their methods of carrying it on further than to weigh the coal sold by them in the manner provided if they are afforded the opportunity to do so when they make their deliveries."

Contrary to the statement on page 47 of appellee's brief, the Wisconsin court did *not* overrule the objections made to the ordinance but simply held that *in some particulars* the ordinance was valid and that therefore its enforcement would not be wholly enjoined. The court said (p. 352):

"Any objection that does not go to the validity of the entire ordinance need not and in fact should not be considered in a suit of this character."

The language quoted above from this opinion clearly indicates that instead of holding reasonable the provisions of the ordinance which would have required the rehandling of coal to non-residents, the court criticized such provisions and refused to hold them reasonable.

Miller v. *Town of Virden*, 16 Man. 479, did not involve the question of reasonableness of the ordinance on weights

and measures, and is therefore not applicable here. Since the 14th Amendment is not in force in Manitoba it is difficult to perceive how the case can be of any assistance in deciding the present appeal.

Pages 48 to 58 of appellee's brief undertake to answer our original brief and we have no further specific comment to make except with respect to pages 50 and 51 of the appellee's brief, where it refers to our contention that a non-resident shipping coal from the mine is discriminated against in being refused a license as a public weighmaster at the point of original loading. This is a privilege granted to a Chicago coal dealer and enables him to comply with the ordinance without any burden other than giving a $2,000 bond, which is reasonable when applied either to him or to a non-resident. On page 51 appellee states that the proper inference to be drawn from appellee's refusal to license public weighmasters at Morris, Illinois, is that the City could not supervise the activities of non-resident weighers outside of the City. We call attention to the fact that this contention is entirely inconsistent with the appellee's concession on page 18 of its brief that the method of protection provided in the ordinance is regulation by a system of licensing. With that concession we agree. The local coal dealer is himself licensed and gives bond as a public weighmaster and then weighs his coal in his own yard under a weighing procedure which for him is not varied one whit by the ordinance from what it would be in the absence of the ordinance. Why, then, not give licenses as public weighmasters—secured by the same sort of bonds—to non-residents owning scales outside of the City of Chicago so that they, too, may comply with the ordinance requiring a public weighmaster's certificate for each load without the burden—which is not imposed on the local dealer—of unloading the coal inside of the city to verify

the weight? If an equal burden is to be imposed upon resident and non-resident, each should be given equal means wherewith to satisfy the burden.

This is particularly pertinent and persuasive because on pages 29 to 31, the appellee concedes that the purpose of the weighmaster's ordinance is to assure a correct *original* weighing and that the additional sections of the Chicago ordinances cited by us on page 21 of our original brief are for the purpose of discovering short weight *after* the giving of the weighmaster's certificate. There being those sections for that purpose, no reason is perceived why the official obligation of a non-resident weighmaster to certify correct original weights might not be as well enforced by a license and bond as in the case of resident weighmasters. Since the system is admittedly a "licensing system" depending for its effectiveness on the giving of a bond and since such bond would be effective irrespective of distance, no sufficient justification has been shown for denying to non-residents the same right to qualify as public weighmasters as is granted to residents.

This discrimination is a denial of equal protection of the laws.

If it be held that the City rightfully refuses to license non-residents as weighmasters, then, viewing the effect on them of the ordinance requiring them to furnish public weighmasters' certificates without the reasonable means of complying with the ordinance, this Court should declare the ordinance unreasonable and oppressive as applied to the business of shipping coal from mine to consumer.

The appellee will then be at liberty to regulate such business by passing a reasonable ordinance which takes into account the inherent differences between the operation of a local coal yard and the operation of the business of

shipping coal from mine to consumer, so as to eliminate the unreasonable requirement that coal shipped by the latter method must be unloaded at scales inside the City of Chicago in order to comply with the weight ordinance.

We respectfully submit that the judgments of the Municipal Court of Chicago and of the Supreme Court of Illinois should be reversed at the cost of the appellee.

Respectfully submitted,

IRWIN T. GILRUTH,
THOMAS C. MCCONNELL,
OWEN RALL,
Counsel for Appellant.

Chicago, Illinois,
December 8, 1936.

FILE COPY

FILED
JUL 9
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 175

MARCUS HAUGE, *Appellant,*

vs.

THE CITY OF CHICAGO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

BARNET HODES,
MARTIN H. FOSS,
Counsel for Appellee.

INDEX.

Subject Index.

	Page
Statement opposing jurisdiction	1
Statement of the case	2
A Federal question, namely, the question whether the ordinance violates Section One of the Fourteenth Amendment, was not involved in the decision of the trial court, was not presented for decision to the Supreme Court of Illinois, and the decision of that court of such Federal question was not necessary to the determination of the cause	3
The decision of the Supreme Court of Illinois was based primarily upon local law	7
No substantial Federal question affording a basis for review by the Supreme Court of the United States is presented by this appeal	8
The Federal question attempted to be asserted is foreclosed by previous United States Supreme Court decisions	18
Motion of appellee to dismiss or affirm	23

Table of Cases Cited.

Brodnax v. Missouri, 219 U. S. 285	19
Campbell v. City of Olney, 262 U. S. 352	7
City of Chicago v. Waters et al., 363 Ill. 125, 1 N. E. (2d) 396	2, 10, 12
City of Chicago v. Wisconsin Lime and Cement Co., 312 Ill. 520, 144 N. E. 3	2, 9, 11
Corrigan v. Buckley, 271 U. S. 323	8
Deming v. Carlisle Packing Co., 226 U. S. 102	8
Doyle v. Atwell, 261 U. S. 590	6
Fischer v. St. Louis, 194 U. S. 361	7
Glenn v. Field Packing Co., 290 U. S. 177	7
Gundling v. City of Chicago, 177 U. S. 183	13, 19
Harding v. Illinois, 196 U. S. 78	5
Heath & Milligan Mfg. Co. v. Worst, 207 U. S. 338	18
House v. Mayes, 219 U. S. 270	18
Hulbert v. City of Chicago, 202 U. S. 275	5, 7
Kansas City Life Ins. Co. v. Gehant, 362 Ill. 58, 198 N. E. 703	4
Lynch v. New York, ex rel. Pierson, 293 U. S. 52	5, 7, 8
McCoy v. Shaw, 277 U. S. 302	6
McMillen v. Ferrum Mining Co., 197 U. S. 343	5
Merchants Exchange v. Missouri, 248 U. S. 365	13, 19
Patterson v. Colorado, 205 U. S. 454	7
People v. Cobb, 343 Ill. 78, 174 N. E. 885	4
Quong Ham Wah Co. v. Industrial Commission, 255 U. S. 445	8
Seaboard Air Line Ry. Co. v. Watson, 287 U. S. 86	6
Schmidinger v. City of Chicago, 226 U. S. 578	18, 20, 21
Wisconsin Lime and Cement Co., Inc. v. City of Chicago, 270 U. S. 626	3
Zucht v. King, 260 U. S. 174	8

Statutes and Authorities Cited.

Constitution of the United States, 14th Amendment, Section 1	3, 4, 8
McQuillin's Municipal Ordinances, Section 485	13
Revised Chicago Code of 1931, Section 2947	3, 4
Section 3621	14

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 175

MARCUS HAUGE, *Appellant*,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, *Appellee*.

APPEAL FROM THE SUPREME COURT OF ILLINOIS; THERE HEARD ON APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

Hon. Frank M. Padden, Trial Judge.

STATEMENT BY APPELLEE OF MATTERS AND GROUNDS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

MAY IT PLEASE THE COURT:

Appellee, City of Chicago, a municipal corporation, respectfully presents to the court the following matters and grounds making against the jurisdiction of the Supreme

Court of the United States on the appeal of appellant from the Supreme Court of Illinois to the Supreme Court of the United States:

Statement of the Case.

This case is one of three cases heard together by the Supreme Court of Illinois on appeal from the Municipal Court of Chicago. While the cases were not consolidated, only one opinion was written to cover the three, and the several judgments of the Municipal Court were affirmed. *City of Chicago* v. *Waters*, *City of Chicago* v. *Hauge*, *City of Chicago* v. *Gorman*, 363 Ill. 125, 1 N. E. (2d) 396.

It involves the validity of an ordinance which has been a part of the municipal code since 1923, one designed to protect the public against false and dishonest weights in deliveries of coal and other commodities sold in vehicle or load lots.

The section in controversy is section 2947 of the Revised Chicago Code of 1931, which provides that every load of any commodity sold in load lots by weight, delivered by wagon, truck or other vehicle within the city, shall be weighed by a public weighmaster and a certificate of weight for each such load issued by such public weighmaster shall be delivered by the person in charge of the vehicle to the purchaser or consignee before any of the commodity is removed from the vehicle. (Abst. 38.)

The ordinance was enacted pursuant to the express delegation of authority conferred upon the city by the legislature of Illinois. It has twice been reviewed by the Supreme Court of Illinois and its validity upheld, once in the instant case and once in the year 1924, in the case of *City of Chicago* v. *Wisconsin Lime and Cement Co.*, 312 Ill. 520, 144 N. E. 3. In the last mentioned case it was not only pronounced reasonable and valid but "most commendable and essential to secure to the purchaser the weight of the

commodity purchased and paid for." The *Wisconsin Lime and Cement Co.* case was taken to the Supreme Court of the United States by writ of error and extensive briefs filed by the parties. By a *per curiam* opinion the case was dismissed for want of jurisdiction. (*Wisconsin Lime and Cement Co., Inc., Plaintiff in Error,* v. *City of Chicago,* (No. 141) 270 U. S. 626.)

Appellant now seeks a further review by the Supreme Court of the United States and claims that he is entitled to invoke the jurisdiction of this Court upon the ground that the ordinance in question is violative of the first section of the Fourteenth Amendment to the Constitution of the United States.

That the Supreme Court of the United States may properly decline to take jurisdiction of the appeal will be apparent from an inspection of the record and consideration of the following grounds making against the jurisdiction of that Court:

1.

A Federal question, namely, the question whether the ordinance violates section one of the Fourteenth Amendment, was not involved in the decision of the Trial Court, was not presented for decision to the Supreme Court of Illinois, and the decision of that court of such Federal question was not necessary to the determination of the cause.

The contention of appellant Hauge that section 2947 was violative of the Fourteenth Amendment was not involved in the decision of the trial court. It was not until the conclusion of the trial and after the trial judge had found in favor of the plaintiff municipality and announced that the only question left was the amount of the fine, that one of defendant Hauge's counsel stated that if the ordinance section were construed to prevent the acts involved in the case,

it would violate the Illinois Constitution and section 1 of the Fourteenth Amendment. (Abst. 26, 27.)

When the case was taken to the Supreme Court of Illinois no formal assignments of error were filed by appellant. In the joint brief and argument filed on behalf of appellant Hauge and the appellants in the other two cases it was stated, among the "errors relied on," that section 2947 was unconstitutional because it "deprives the defendant of the equal protection of the laws and of liberty and property without due process of law in violation of the first section of the Fourteenth Amendment of the Constitution of the United States." This quoted statement contained the only mention made of the Fourteenth Amendment. The point was not contained among the points and authorities or in the argument portion of appellant's brief. Therefore the point, if properly raised at all, was abandoned by appellant. Inasmuch as the point was not urged among the points relied upon by appellant but merely mentioned in the statement portion of appellant's brief among the "errors relied on" it was not treated by appellee as a real issue and not discussed in appellee's brief. Furthermore the point is nowhere mentioned or relied upon in the joint reply brief and argument filed by appellant Hauge and the appellants in the other two cases before the Supreme Court of Illinois. In fact appellants expressly state on page 1 of their reply brief "that the sole ground of defense in the court below and the principal error relied upon by the appellants, is that the ordinance is invalid as being unreasonable."

Assignments of errors not briefed nor argued are waived.

Kansas City Life Ins. Co. v. *Gehant*, 362 Ill. 58, 198 N. E. 703;

The People v. *Cobb*, 343 Ill. 78, 174 N. E. 885.

Such rule of practice will be recognized by the Supreme Court of the United States.

Hulbert v. *City of Chicago,* 202 U. S. 275, 281.

Neither was the point discussed in the oral argument. It is not sufficient to raise a Federal question for the first time in a petition for rehearing.

Harding v. *Illinois,* 196 U. S. 78, 84;

McMillen v. *Ferrum Mining Co.,* 197 U. S. 343, 347.

The point of alleged violation of the Fourteenth Amendment not being properly raised in the trial court and not being presented to the Supreme Court of Illinois, and therefore not being necessary to the determination of the cause in the Supreme Court of Illinois, a jurisdictional ground is not furnished the Supreme Court of the United States upon which it can take jurisdiction of this appeal. The gratuitous pronouncement contained in the opinion of the Supreme Court of Illinois, which is to the effect that the ordinance is not susceptible to the charges lodged against it of being a violation of section 1 of the Fourteenth Amendment, merely evidences, as we view it, a thoroughness on the part of the writer of the opinion to cover all probable phases of the case. Not being formally raised and presented it was not a question "necessary to the determination of the cause," therefore the court's dictum cannot provide the basis for an appeal to this Court.

In the case of *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52, a case in which the relator sought to invoke rights under the Fourteenth Amendment of the Constitution of the United States, this Court, speaking through the Chief Justice, said (p. 54):

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a

federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question *was necessary to the determination of the cause,* and that it was actually decided *or that the judgment as rendered could not have been given without deciding it.*" (Italics ours.)

There is no doubt that the judgment rendered by the Supreme Court of Illinois in the case at bar could have been given without deciding that the ordinance did not violate the Fourteenth Amendment.

The decision of the Supreme Court of Illinois on non-Federal grounds adequately supports its judgment. That being the case, the Supreme Court of the United States will not take the case on appeal on the alleged Federal questions raised.

Doyle v. *Atwell,* 261 U. S. 590, 592;
McCoy v. *Shaw,* 277 U. S. 302, 303.

The assignments of error filed by appellant on his appeal to the Supreme Court of the United States, which purport to raise Federal questions, are all general, uncertain and indefinite. They merely state that the Supreme Court of Illinois erred in holding that the ordinance section does not deny to appellant the equal protection of the laws and does not deprive appellant of liberty and property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States. None of them sets out with particularity the Federal questions attempted to be asserted. For this reason no question is presented to the Supreme Court of the United States for review.

Seaboard Air Line Ry. Co. v. *Watson,* 287 U. S. 86, 91.

The alleged Federal questions not having been timely and properly raised in the Supreme Court of Illinois, not

having been necessary to the determination of the cause by that court, and not having been adequately raised in the Supreme Court of the United States, the Supreme Court of the United States will not take this case on appeal.

Hulbert v. *City of Chicago,* 202 U. S. 275, 279;
Lynch v. *New York ex rel. Pierson,* 293 U. S. 52.

II.

The decision of the Supreme Court of Illinois was based primarily upon local law.

Examination of the record and the opinion of the Supreme Court of Illinois discloses that the decision of that court was based primarily upon local law. The only propositions argued and the only points necessary to a decision of the case were (1) whether a direct appeal was cognizable from the Municipal Court of Chicago to the Supreme Court of Illinois, (2) the validity of the ordinance, and (3) where the sale of the coal took place. (Appellant's brief, pp. 8, 9; Appellee's brief, pp. 13-15.)

The question of the validity of a municipal ordinance, being a question of local law, will not be reviewed by the Supreme Court of the United States.

Fischer v. *St. Louis,* 194 U. S. 361, 369;
Glenn v. *Field Packing Co.,* 290 U. S. 177, 178.

The other questions of local law are not open to re-examination in the Supreme Court of the United States.

Patterson v. *Colorado,* 205 U. S. 454, 459;
Campbell v. *City of Olney,* 262 U. S. 352, 354.

The decision of the state court being based primarily upon local law and a decision upon the Federal question, whether the ordinance violated the Fourteenth Amendment, not being necessary to the determination of the

cause, the case is not reviewable in the Supreme Court of the United States.

Lynch v. *New York*, 293 U. S. 52, 54.

III.

No substantial Federal question affording a basis for review by the Supreme Court of the United States is presented by this appeal.

The Supreme Court of the United States has repeatedly held that it will decline jurisdiction, although the constitutionality of a state law is drawn in question, when it appears that the constitutional question presented is not substantial in character.

Zucht v. *King*, 260 U. S. 174, is a case wherein the plaintiff in error sought to contend that an ordinance of the City of San Antonio, Texas, requiring compulsory vaccination, was violative of the due process and equal protection clauses of the Fourteenth Amendment, and that it denied plaintiff equal protection of the laws.

See also:

Corrigan v. *Buckley*, 271 U. S. 323, 330;

Quong Ham Wah Co. v. *Industrial Commission*, 255 U. S. 445;

Deming v. *Carlisle Packing Co.*, 226 U. S. 102.

The apparent afterthought attempt of appellant Hauge to inject a Federal question into the case should be unavailing when consideration is given to the character of the ordinance here involved, the need to protect the public against dishonest weights, and the power of the states and their municipalities, under their general police power, to guard their inhabitants and promote the public welfare uninterfered with by the Fourteenth Amendment.

The Fourteenth Amendment has ever been interpreted by the Supreme Court of the United States as promoting the public welfare and as not curtailing state agencies in coping with those who would cheat and defraud the unsuspecting public.

The ordinance involved in the case at bar is a salutary measure. It has been a part of appellee's municipal code for many years and received the support not only of the courts of Illinois but business concerns conducting their affairs on an ethical basis.

The Supreme Court of Illinois in the case of *City of Chicago* v. *Wisconsin Lime and Cement Co.*, 312 Ill. 520, 144 N. E. 3, said with reference to the ordinance, on page 522 of its opinion:

> "In buying ordinary articles the buyer generally may see the article weighed or have the means at hand to ascertain whether it is short weight, but when applied to load lots it was and is impossible for the purchaser to determine the weight of the load. The purpose of the ordinance was most commendable and essential to secure to the purchaser the weight of the commodity purchased and paid for, * * *."

And on page 523 it was said:

> "The power to regulate necessarily includes the power to make the regulation effective and to provide for methods of weighing which will secure truthful weights. The method provided for such regulation is the appointment of a weighmaster required to give a bond and pay a small fee, instead of the weighing being done by the seller, without the knowledge or supervision of anyone or any method of ascertaining whether the scales are correct or the weighing honest. The power to pass such an ordinance is sustained by many decisions."

In concluding its opinion the court said (p. 524):

"There is no legal objection to the ordinance."

In its later case, the case at bar, when again considering the same ordinance, the court said (*City of Chicago* v. *Waters*, 363 Ill. 125, 131, 1 N. E. (2d) 396):

> "The opportunity to defraud the consumer in the sale of coal in load lots is great and the consumer has no adequate way to protect himself against being cheated. The delivery of true weights of coal to the consumer is a matter clearly related to the public welfare and the city has the right to adopt reasonable ordinances therefor."

And on page 132 it said:

> "The object of the ordinance was not to benefit persons engaged in the coal business, or to give one competing dealer an advantage over another, or to enable some to comply with the ordinance readily and without inconvenience while others could not, but its purpose was to endeavor to give to the buyer of the coal, as nearly as practicable, honest weight. The defendants, non-residents of the city of Chicago, are asking for a practice of weighing, as applied to the business done by them in the city, which under the ordinance here would not apply to those truckers living in the city and delivering coal from the local yards or local dealers in the city to the consumer. To recognize the demand of the defendants would be to discriminate between the local truckmen and dealers in Chicago in favor of non-residents."

The ordinance under consideration requires that every load of coal or similar commodity sold in load lots by weight and delivered by wagon, truck or other vehicle within the city shall be weighed by a public weighmaster and that the certificate of weight for each such load issued

by a public weighmaster shall be delivered by the driver or person in charge of the vehicle to the purchaser or consignee at the time of the delivery and before the commodity is unloaded. (Abst. 38.)

The section relating to weight certificates prescribes the manner in which the net weight shall be determined. To insure correct net weights and prevent a weighmaster from guessing at the weight of the vehicle, it provides that in no case shall any public weighmaster state in his certificate the tare weight of any vehicle until he shall have weighed the vehicle in such manner as to secure the weight thereof. (Abst. 53.) This is a requirement manifestly necessary in order to obtain the correct net weight. It is a measure necessary to protect the purchaser.

This salutary ordinance appellant claims is violative of section 1 of the Fourteenth Amendment.

As pointed out by the Supreme Court of Illinois, without the protection afforded by the ordinance, the purchaser of coal in load lots would be at the mercy of unscrupulous dealers. It said in the case of *City of Chicago* v. *Wisconsin Lime and Cement Company,* 312 Ill. 520, 522, 144 N. E. 3:

> "In buying ordinary articles the buyer generally may see the article weighed or have the means at hand to ascertain whether it is short weight, but when applied to load lots it was and is impossible for the purchaser to determine the weight of the load. The purpose of the ordinance was most commendable and essential to secure to the purchaser the weight of the commodity purchased and paid for, * * *."

And on page 523 it said:

> "The power to regulate necessarily includes the power to make the regulation effective and to provide for methods of weighing which will secure truthful weights. The method provided for such regulation is

> the appointment of a weighmaster required to give a bond and pay a small fee, instead of the weighing being done by the seller, without the knowledge or supervision of anyone or any method of ascertaining whether the scales are correct or the weighing honest. The power to pass such an ordinance is sustained by many decisions."

In the case at bar it said (*City of Chicago* v. *Waters*, 363 Ill. 125, 131, 1 N. E. (2d) 396):

> "The opportunity to defraud the consumer in the sale of coal in load lots is great and the consumer has no adequate way to protect himself against being cheated."

The ordinance affects alike all those who deliver coal and other commodities in load lots in the City of Chicago whether they be residents or nonresidents of the city. No good reason is seen why nonresidents of the city should be exempted from its provisions when residents are required to conform to them. By enforcing the ordinance against nonresident as well as resident dealers of coal it cannot, we submit, be held to deny to a nonresident the equal protection of the laws guaranteed by the Fourteenth Amendment. If appellant were relieved of its requirements, then the ordinance might be subject to successful attack by local truckers on the ground of unlawful discrimination.

It is also to be noted that the record shows that, although appellant is a nonresident of Chicago and was hauling coal from Morris, Illinois, he was delivering it for one Burgess, a Chicago coal dealer doing business in Chicago as Northern Coal Co. (Abst. 20, 25.) There cannot be any doubt that the ordinance is applicable to Chicago coal dealers, and as applied to them that it is not violative of the Fourteenth Amendment.

The Fourteenth Amendment does not interfere with the police power of the States to protect the general welfare of

the public. Ordinances which regulate the methods of weighing coal and other bulky articles sold and delivered in load lots within the boundaries of the municipality are strictly within the police power, and are common in all cities and towns.

Gundling v. *City of Chicago,* 177 U. S. 183, 188.
Merchants Exchange v. *Missouri,* 248 U. S. 365, 368.
McQuillin's Municipal Ordinances, Section 485.

Notwithstanding the provisions of the Fourteenth Amendment, the States and their municipalities are left with a wide range of legislative discretion in promoting the general welfare, and the wisdom of the legislative body in the case at bar should not be disturbed.

The statement made in appellant's statement of jurisdictional facts to the effect that the destruction of a lawful and legitimate business will follow the sustaining of the ordinance is nothing short of absurd. The business of appellant and those similarly situated, who occasionally employ their general merchandise trucks, when not engaged in farming or some other occupation, in hauling load lots of coal from Morris, Illinois for delivery to Chicago customers of a Chicago coal dealer, will merely have to conform to the requirements regarding certified weights that local truckers and dealers are obliged to meet, this for the quite essential purpose of securing to the purchasing public honest weights. Whether the enforcement of the ordinance injuriously affects the business of the Morris strip mine is not directly involved in this case. Even were it involved, it is not seen how that company would be entitled to enjoy the business of selling coal in load lots to Chicago inhabitants except under the regulations applicable to all dealers of load lots, which regulations are designed to protect the purchasers against fraudulent weights.

Even lawful and legitimate business is required to submit to regulation under the police power of the States which is necessary to protect the general welfare of the public. Certainly it is necessary to secure to the public protection against short weights when buying load lots of coal. Protective measures are found in the laws of most of the States and in the ordinances of large cities.

The coal user in Chicago needs protection in the matter of dishonest weights when he buys from established coal dealers in Chicago who are directly under the supervision of the city's Weights and Measures Department. To a greater degree the user needs protection when coal is delivered to him by irresponsible, itinerant, part-time truckers using a miscellaneous lot of vehicles instead of regular coal trucks, from a mine 62 miles from Chicago. If the ordinance were not enforceable, then the conditions prevailing prior to 1924, when it was enacted, would recur and practices of fraud, short weighing and chicanery again prevail. Then the retail coal industry of Chicago would be demoralized by unfair and unethical competition and the public would be victimized by substitutions, short weights and all the other nefarious practices used prior to 1924.

The ordinance can be complied with by any legitimate and honest dealer or trucker. The cost of weighing a truck load of coal and procuring a public weighmaster's certificate of weight is but 25 cents. (Section 3621, Abst. 52.)

Appellant's statement that the coal hauled by appellant was weighed at the mine 62 miles from Chicago "in accordance with State laws and over State-inspected scales" is misleading and calculated to deceive the court. The certificate on the shipping ticket (Abst. 14, 15) is a fraud upon the customer. To weigh coal on a State-inspected scale means nothing when no certificate of weight, issued by a responsible authority, is furnished the customer.

Furthermore, on the long haul to Chicago, perhaps a night haul, a portion of the load may be lost, some of it may be bartered for gasoline en route, and there is no assurance that the customer would receive the quantity weighed at the mine.

Appellant's statement that an unequal burden is placed upon the nonresident coal dealer, even if material and in issue in the case at bar, is not convincing. Chicago coal dealers who receive coal at their city yards by steamer, railroad car or motor truck are required to handle the coal. They get no advantage over the nonresident dealer by reason of the ordinance.

Appellant relies in his statement of jurisdictional facts to a considerable extent upon the dissenting opinion filed in the instant case, though the question of the constitutionality of the ordinance is mentioned nowhere in that dissenting opinion.

An examination of the ordinance and the record in this case will, we feel confident, convince this Court that the views expressed in the dissenting opinion are unsound. There is, we submit, not the slightest evidence in the record nor the slightest suspicion to be gleaned from the ordinance itself that it is "designed for the purpose of conferring a monopoly in the coal business upon dealers residing within the City of Chicago, to the exclusion of other citizens residing outside of that city."

The dissenting justices say (p. 135):

> "This is apparent from the requirement that the empty wagon or truck must be weighed before the load is delivered to the purchaser. We cannot perceive any reason why the purchaser could not as well be protected by weighing the empty wagon or truck after delivery. This would permit hauling the load across public scales to obtain the gross weight, the unloading

> of the commodity, followed by weighing the empty wagon or truck to obtain the tare weight, and the subtraction of the tare from the gross to obtain the net."

It should be noted in connection with appellee's ordinance that the specific provision with reference to a public weighmaster certification as to the tare weight reads as follows (Abst. 53):

> "In no case shall any public weighmaster state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight as specified herein; * * *."

This leaves the manner and time of ascertaining the tare weight to the public weighmaster and the provision is by no means so drastic as appellant's counsel or the dissenting justices state. Of course to give value to the weight certificate it must contain the true net weight, and in order to be able to state the net weight it is incumbent upon the public weighmaster to ascertain the gross and tare weights.

Furthermore in this connection it seems not improper to state that there is nothing in appellee's weight ordinance which would prevent a downstate coal company from establishing an agent in Chicago who might qualify and be bonded as a public weighmaster and who might weigh upon his public weighmaster scales any coal originating from the downstate company.

As stated in the majority opinion of the Supreme Court of Illinois, the object of the ordinance is not to benefit or inconvenience coal dealers but to give the buyer of the coal honest weight. When the object of the ordinance is to protect a large number of purchasers of coal in a great city from being cheated by short weights and when the business of selling coal is carried on in the manner disclosed in the record in this case, with a Chicago concern (Northern Coal Co., Abst. 25, and agent, Burgess, Abst. 20) selling the coal

in Chicago to Chicago users, and when the coal is hauled by a nondescript group of truckers, nonresidents of Chicago, not regularly engaged in the coal business, which the mining company claims to have no control over, but on the contrary disclaims responsibility for, it is plain to see what little protection the purchaser of coal would receive by the impractical plan suggested by the dissenting justices of weighing the vehicle after delivery of the coal. After the customer, who knows nothing of the identity or integrity of the trucker, has parted with the purchase price it would be overtasking human credulity to expect a free-lance trucker to go to a public scale, have his vehicle weighed, pay for the weighing and, finding that his estimated tare weight was too small, drive back to the customer and refund to him a portion of the price already collected. The suggestion that the purchaser could be protected by the weighing of the empty vehicle after delivery and after the purchaser had parted with his money and the nonresident, unknown and irresponsible trucker had gone is impracticable.

Furthermore the weights and measures department of the city could not control the situation if it were not able to supervise the weighing before the coal was delivered and paid for and the nonresident trucker had departed. It would have no one to hold responsible and the customer would have little or no chance to get redress.

We therefore respectfully contend that the delivery of true weights of coal to the consumer is a matter clearly related to the public welfare, that the ordinance is one strictly within the city's police power, that it promotes the public welfare, that it is not violative of the Fourteenth Amendment and that a substantial Federal question is not presented in the case at bar.

IV.

The Federal question attempted to be asserted is foreclosed by previous United States Supreme Court decisions.

The state, or a municipality of the state, under its police power has the right to prevent fraud generally in any transaction and especially in weights and measures of the commodities of life.

In *Schmidinger* v. *City of Chicago,* 226 U. S. 578, writ of error to the Supreme Court of Illinois, the validity of appellee's ordinance prescribing standard sizes of loaves of bread and prohibiting the sale of other sizes was attacked on the ground that it violated the due process of law, the freedom of contract and the equal protection clauses of the Fourteenth Amendment. In affirming the judgment of the state court the Supreme Court of the United States held that there was no absolute liberty of contract, that limitations thereon by police regulations of the state are frequently necessary in the interest of public welfare and do not violate the rights guaranteed by the Fourteenth Amendment; that states and their municipalities have the right to regulate trades and callings in the exercise of the police power without Federal interference under said clauses of the Fourteenth Amendment; and that mere inconvenience to merchants conducting a business subject to police regulation does not vitiate the exercise of the state's power.

The *Schmidinger* case is thought to be controlling upon the case at bar.

In *Heath & Milligan Mfg. Co.* v. *Worst,* 207 U. S. 338, 354, it was said:

> "Exact wisdom and nice adaptation of remedies are not required by the Fourteenth Amendment, nor the crudeness nor the impolicy nor even the injustice of state laws redressed by it."

In *House* v. *Mayes*, 219 U. S. 270, a State statute to prevent fraud in the purchase and sale of grain and other commodities was held to be a valid exercise of the police power and not unconstitutional as a deprivation of property or denial of equal protection of the law.

In *Merchants Exchange* v. *Missouri*, 248 U. S. 365, a State statute was upheld which forbade any person other than a duly authorized and bonded State weigher to issue any weight certificate for grain weighed at any public elevator. The court held it to be consistent with the due process and equal protection clauses of the Fourteenth Amendment and said (p. 368):

> "The regulation of weights and measures with a view to preventing fraud and facilitating commercial transactions is an exercise of the police power."

In *Brodnax* v. *Missouri*, 219 U. S. 285, it was held that where a State statute showed on its face that the subject regulated needed to be regulated for the protection of the public against fraudulent practices to its injury the court would not strike down a police regulation that does not clearly violate the Federal Constitution. In the opinion it was said that although the due process clause of the Fourteenth Amendment secures liberty of contract it "does not confer a liberty to disregard regulations as to the conduct of business which the State lawfully establishes for all within its jurisdiction."

Gundling v. *City of Chicago*, 177 U. S. 183, involved the validity of appellee's cigarette license ordinance which was attacked on the ground that it violated the due process and equal protection clauses of the Fourteenth Amendment. In holding that the enactment of the ordinance violated no provision of the Federal Constitution the court said (p. 188):

> "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the vari-

ous cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference."

Since appellant's business of delivering coal to Chicago users is clearly subject to police regulation any inconvenience the ordinance may cause him will not vitiate the exercise of the city's power.

Schmidinger v. *City of Chicago*, 226 U. S. 578.

Appellant states on page 7 of his statement of jurisdictional facts that the unavoidable effect of the ordinance is to require that coal shipped into the City of Chicago by truck direct from the mine to a Chicago consumer be unloaded inside the city limits so that the truck can first be weighed empty by a public weighmaster in order to obtain a tare weight for the purpose of making the certificate, and he argues that the business of itinerant truckers is destroyed by the necessity to unload in order to obtain the tare weight of the vehicle.

This is an extravagant statement not supported by the record. A public weighmaster must of course furnish a certificate showing the gross, tare and net weight and the consumer should be protected by a certificate showing the true net weight for which he is called upon to pay, but the ordinance does not call for any unloading or rehandling of coal. The time and method of weighing the empty vehicle is left to the public weighmaster. The weighing of the truck

empty is an incident in the transportation business appellant is engaged in and if, by reason of the fact that appellant is a nonresident of Chicago, it is less convenient for him to get his empty truck weighed before loading it, this inconvenience should not call for the striking down of a salutary regulation designed to protect the public. A nonresident coal trucker can comply with the ordinance if he is disposed to do so. That he is unwilling to do so evidences an intention not to deal fairly with the consumer or to seek an advantage over resident truckers.

There is no doubt that a state or a municipality may protect the general welfare of the public even though a lawful business is to some extent inconvenienced.

Schmidinger v. *City of Chicago*, 226 U. S. 578.

The authorities cited by appellant on page 16 of his statement bear this out. To sustain the validity and constitutionality of the ordinance it is not necesary that a coal mine or coal dealer located 62 miles from Chicago enjoy lower delivery costs than those local dealers who maintain coal yards in the city.

The argument that a mine owner located 62 miles beyond the city's limits and beyond its supervisory jurisdiction should be permitted to obtain a City of Chicago public weighmaster's license is outside the issues in the case. Furthermore, it is absurd.

The alleged inequality, the claimed unequal privilege, which appellant complains of, is not real and is not in any sense a denial to appellant of the equal protection of the laws or a deprivation of liberty and property without due process of law. It is not a discrimination against appellant. At most, it is only an inconvenience due to the fact that he hauls coal from a point 62 miles from Chicago, an incidental problem to be solved by him in the event he desires to deliver load lots of coal in the Chicago market.

Neither does the ordinance unjustly discriminate against any coal mine or mining community outside of Chicago. The rejected petition of those persons who sought to appear as *amici curiæ* was clearly improper and its inclusion in the record to be prepared for filing in the Supreme Court of the United States is likewise improper. That the ordinance affords protection to the purchaser, a pecuniary saving to him by minimizing losses which he would otherwise suffer through short weights, far transcending any advantage in securing cheap coal, is apparent.

For the reasons herein set forth it is respectfully submitted that the Supreme Court of the United States should decline to take jurisdiction of this appeal.

BARNET HODES,
Corporation Counsel;
MARTIN H. FOSS,
Asistant Corporation Counsel,
Counsel for Appellee, City of Chicago.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 175

MARCUS HAUGE,

Appellant,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS; THERE HEARD ON APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

Honorable Frank M. Padden, Trial Judge.

MOTION OF APPELLEE TO DISMISS OR AFFIRM.

MAY IT PLEASE THE COURT:

Comes now City of Chicago, a municipal corporation, appellee herein, by Barnet Hodes, Corporation Counsel, and Martin H. Foss, Assistant Corporation Counsel, its counsel, and moves the Court to dismiss with costs the appeal

taken herein to this Court by Marcus Hauge, appellant, upon the following grounds:

1. A Federal question, namely, the question whether the ordinance of appellee involved in the case violates Section 1 of the Fourteenth Amendment to the Federal Constitution, was not involved in the decision of the trial court, not presented for decision to the Supreme Court of Illinois, and the decision of that court of such Federal question was not necessary to the determination of the cause.

2. The decision of the Supreme Court of Illinois was based primarily on local law and questions of local law are not open to reexamination in this Court.

In the alternative, appellee moves this Court to affirm the judgment of the Supreme Court of Illinois on the following grounds:

1. No substantial Federal question affording a basis for review by this Court is presented by the appeal.

2. The Federal question which appellant attempts to raise in this Court is foreclosed by the prior decisions of this Court.

Respectfully submitted,

BARNET HODES,
Corporation Counsel;
MARTIN H. FOSS,
Assistant Corporation Counsel,
Counsel for Appellee, City of Chicago, a Municipal Corporation.

NOV 30 1936
CHARLES ELMORE CRO
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 175

MARCUS HAUGE,

Appellant,

vs.

CITY OF CHICAGO, a Municipal Corporation,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT FOR APPELLEE.

BARNET HODES,
Corporation Counsel,

MARTIN H. FOSS,
Assistant Corporation Counsel,

Attorneys for Appellee.

CHAMPLIN-SHEALY COMPANY, CHICAGO 365

INDEX.

PAGE

Statement of the Case..... 1
Summary of Argument..... 8
Argument..... 13

I.

The provisions of the ordinance, its history, and the purpose sought to be accomplished by it..... 13

II.

There is no justiciable controversy involved in this case. The existence of the evil of short weighing being admitted, the method of dealing with it is a legislative and not a judicial question..... 20

III.

The ordinance does not violate Section 1 of the Fourteenth Amendment to the Federal Constitution.... 33
Conclusion..... 57

TABLE OF CASES.

	PAGE
Armour & Co. v. North Dakota, 240 U. S. 510, 513	28
Atlantic Coast Line R. R. Co. v. Georgia, 234 U. S. 280, 287, 288	28
Austin et al v. Atlanta, 28 Ga. App. 702, 113 S. E. 113	40
Barbier v. Connolly, 113 U. S. 27, 32	29
Barfield v. Stevens Mercantile Co., 85 S. C. 186, 67 S. E. 158	46, 48
Booth v. Illinois, 184 U. S. 425, 429	26
Brittingham & Hixon Lumber Co. v. City of Sparta, 157 Wis. 345, 147 N. W. 635	46
Brodnax v. Missouri, 219 U. S. 285, 293	29
Brushaber v. Union Pacific R. R. Co., 240 U. S. 1, 25	29
Borroughs & Cannon v. United States, 290 U. S. 534, 547,548	27
Campbell v. Olney, 262 U. S. 352	34
Carstairs v. Coebron, 193 U. S. 10	34
Champion v. Ames, 188 U. S. 321, 353	27
Charleston v. Rogers, 13 S. C. L. Rep. 293, (2 McCord, 495)	45
Chicago etc. R. Co. v. Illinois, 200 U. S. 561	35
City of Cartersville v. McGinnis, et al., 142 Ga. 71, 82 S. E. 487	39, 48
City of Chicago v. Gorman, 363 Ill. 125, 1 N. E. (2d) 396	2
City of Chicago v. Hauge, 363 Ill. 125, 1 N. E. (2d) 396	2
City of Chicago v. Kautz, 313 Ill. 196, 144 N. E. 805	16, 56
City of Chicago v. Waters, 363 Ill. 125, 1 N. E. (2d) 396	2, 3, 34
City of Chicago v. Wisconsin Lime & Cement Co., 312 Ill. 520, 144 N. E. 3, 270 U. S. 626	3, 14, 18, 41
City of Cincinnati v. Broadwell, 3 Ohio Dec. Repr. 286	44, 48

City of Lamar v. Weidman, 57 Mo. App. 507, 513..44, 48
City of Raleigh v. Sorrell, 46 N. C. 49..... 44
City of St. Charles v. Elsner, 155 Mo. 671, 56 S. W. 291 43
City of Savanna v. Robinson, 81 Ill. App. 471, 478..40, 47
Collins v. City of Louisville, 41 Ky. Rep. (2 B. Mon.) 134 . . . .41, 47
Cotting v. Kansas City Stockyards Co., 183 U. S. 79.. 37
Davidson v. Sadler, 23 Tex. Civ. App. 600, 57 S. W. 54 46
Davis v. Town of Anita, 73 Ia. 325, 35 N. W. 244.... 41
Dobbins v. City of Los Angeles, 195 U. S. 223, 235, 240 55
Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 9, 11 55
Fischer v. St. Louis, 194 U. S. 361..... 34
Fox v. Washington, 236 U. S. 273, 278..... 29
Gaines v. Coates, 51 Miss. 335..... 42
German Alliance Ins. Co. v. Lewis, etc. of Kansas, 233 U. S. 389, 417..... 29
Green et al. v. Frazier, etc. et al., 253 U. S. 233, 240.. 29
Gundling v. City of Chicago, 177 U. S. 183, 188..... 37
Hamilton etc. v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146, 161-162..... 29
Hegeman Farms Corp. v. Baldwin et al., 293 U. S. 163, 170, 171 32
Hibben v. Smith, 191 U. S. 310..... 34
Hill v. Fetheroff, 236 Pa. 70, 84 Atl. 677..... 52
Home Bldg. & Loan Ass'n v. Blaisdell et al., 290 U. S. 398, 447-448..... 29
House v. Mayes, 219 U. S. 270..... 35
Jay Burns Baking Co. v. Bryan, 264 U. S. 504, 513.. 55
Jeffery Mfg. Co. v. Blagg, 235 U. S. 571, 577..... 37
Lottery Case, 188 U. S. 321, 353..... 27
Louis K. Liggett Co. v. Baldrige, 278 U. S. 105, 113.. 55
Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32 34
Martin v. Foy, 234 U. S. 698..... 46
May Grain & Coal Co. v. Kansas City, Mo., 10 Fed. Supp. 792 56

McCray v. United States, 195 U. S. 27, 54..... 29
McLean v. Arkansas, 211 U. S. 539..... 35
Merchants Bank v. Pennsylvania, 167 U. S. 461, 463.. 37
Merchants Exchange v. Missouri, 248 U. S. 365....35, 43
Metropolis Theatre Co. v. City of Chicago, 228 U. S. 61, 69 .....28, 57
In re Miller v. Town of Virden, 16 Man. 479..... 47
Milliken v. Meyers, 25 Cal. App. 510, 144 Pac. 321.... 39
Missouri Pacific Ry. Co. v. Humes, 115 U. S. 512, 520.. 29
Nebbia v. New York, 291 U. S. 502, 537..... 29
New York & N. E. R. R. Co. v. Bristol, 151 U. S. 556, 570 .....29, 35
Norman v. B. & O. R. R. Co., 294 U. S. 240, 306..... 29
Ohio v. Dollison, 194 U. S. 445, 447..... 37
Oklahoma City v. Colt, 40 Okla. 202, 137 Pac. 359.... 45
O'Maley v. Borough of Freeport, 96 Pa. 24..... 45
Petty v. State, 102 Ark. 170, 143 S. W. 1067..... 39
Pierce v. Society of Sisters, 268 U. S. 510, 534, 535.. 55
Pittsburgh etc. Coal Co. v. Louisiana, 156 U. S. 590, 600 36
Powell v. Pennsylvania, 127 U. S. 678, 686..... 29
Rast etc. v. Van Deman & Lewis Co., 240 U. S. 342, 366 28
Schmidinger v. Chicago, 226 U. S. 578, 588.....29, 37
Scott v. Boyle, 164 Cal. 321, 128 Pac. 941..... 39
State v. Nelson, 66 Minn. 166, 68 N. W. 1066..... 51
State v. Smith, 123 Ia. 654, 96 N. W. 899..... 41
State v. Tyson, 111 N. C. 687, 16 S. E. 238..... 44
State ex rel Barker v. Merchants Exchange, 269 Mo. 346, 190 S. W. 903..... 43
State ex rel Stone v. Eck, 121 Minn. 202, 141 N. W. 106 42
Stokes & Gilbert v. City of New York, 14 Wend. 87.. 44
Sumter v. Deschamps, 4 S. C. 297.....46, 47
Sylvester Coal Co. v. City of St. Louis, 130 Mo. 323, 32 S. W. 649..... 42
Taylor v. Anderson, 40 Okla. 316, 137 Pac. 1183....45, 48

Taylor v. Pine Bluff, 34 Ark. 603 ..... 38, 47
Twining v. New Jersey, 211 U. S. 78, 106 29
Vega S. S. Co. v. Consolidated Elevator Co., 75 Minn. 308, 77 N. W. 973 ..... 42, 48
Waugh v. Board of Trustees of the Univ. of Miss., 237 U. S. 589, 597 29
Weaver v. Palmer Bros. Co., 270 U. S. 402, 412, 415 .. 55
Wills v. City of Ft. Smith, 70 Ark. 221, 66 S. W. 922 .. 39
Wong Ham Wah Co. v. Industrial Commission, 255 U. S. 445 34
Yates v. City of Milwaukee, 12 Wis. 673 46

STATUTES AND ORDINANCES.

Illinois Revised Statutes, 1935, Ch. 24, Art. V, secs. 54, 55, 56, 66, 91, 102 13

Revised Chicago Code of 1931:

Section 2939 30
Section 2947 ..... 2, 8, 13, 31
Section 2950 30
Section 2951 30
Section 3342 ..... 16, 30
Section 3445 30
Section 3623 ..... 8, 13, 52

TEXTBOOKS.

Annotated Cases, 1918 D, 159 ..... 38, 39
Annotated Cases, 1912 C, 255, 256 38
Dillon on Municipal Corporations, 5th Ed., sec 710 .. 38
Freund on Police Power, secs. 273-275 38
L. R. A. (N. S.) Vol. 51, p. 731 38
McMillan on Municipal Ordinances, sec. 485 38
Ruling Case Law, Vol. 28, Weights and Measures, par. 5, p. 5 38

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 175

MARCUS HAUGE,

Appellant,

vs.

CITY OF CHICAGO, a Municipal Corporation,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT OF THE CASE.

The appellant, Marcus Hauge, while hauling coal for one W. Burgess, an independent coal dealer or broker residing and doing business in Chicago, Illinois, under the name of Northern Coal Company, was convicted in the Municipal Court of Chicago of delivering a truck load of coal which had not been weighed by a public weighmaster, and for which a public weighmaster's weight certificate had not been issued, to a resident of Chicago named Tresca,

one of Burgess' customers, in violation of section 2947 of the Weights and Measures ordinance of the Revised Chicago Code of 1931. (R. 4, 9, 11, 15, 19, 20) This section relates to commodities sold in load lots and requires that every load of coal sold in load lots by weight, delivered by wagon, truck or other vehicle within the city, shall be weighed by a public weighmaster and that a public weighmaster's certificate of weight shall be delivered by the driver or person in charge of the vehicle to the purchaser or consignee of the load, or his agent, at the time of the delivery and before unloading. (R. 29)

On Hauge's appeal to the Supreme Court of Illinois that court affirmed the judgment of conviction and rendered an opinion upholding the validity and constitutionality of the ordinance. *City of Chicago* v. *Waters; City of Chicago* v. *Hauge; City of Chicago* v. *Gorman;* 363 Ill. 125, 1 N. E., (2d) 396; R. 45.

Hauge lived at Morris, Illinois, 62 miles southwest of Chicago. He testified that the delivery ticket was made out by Burgess. (R. 15) Hauge got the coal which he delivered to Burgess' customer, Tresca, at the mine of the Morris Coal and Mining Company in Morris, Illinois. (R. 13) He did not know Tresca before he delivered the coal. (R. 14) From Tresca he collected a flat price for the coal. The price he afterwards paid over to Burgess less his hauling charge. (R. 16, 17) Originally the coal was billed by the Morris Coal and Mining Company to Burgess. (R. 11, 20) Burgess split the load and had Hauge make deliveries to three of Burgess' customers, part of it to Tresca, part to a second customer, and the remaining part to a third customer. (R. 16) The delivery ticket made out by the Morris Coal and Mining Company to Burgess is shown on page 11, but the delivery tickets issued by Burgess to Tresca or the other customers do not

appear in the record. The Supreme Court of Illinois held that the contract of sale was made within the city limits of Chicago. It also held that Hauge was neither selected nor designated by the purchaser, Tresca, and Tresca, so far as he knew, did not pay any separate charge for the carriage of the coal. The price to him was net, delivered to him by the seller. (*City of Chicago* v. *Waters,* 363 Ill. 125, 129; R. 47) It was admitted by Hauge that the coal had not been weighed by a City of Chicago public weighmaster as was required by the ordinance and that the prescribed certificate of weight had not been used and was not in his possession for delivery to the purchaser. (R. 14; Appellant's brief, p. 4)

Section 2947 is part of an ordinance enacted by the City of Chicago in 1922, pursuant to the express delegation of authority contained in article V of the Cities and Villages act, chapter 24, Illinois Revised Statutes, giving power to cities in Illinois to regulate the inspection, weighing and measuring of coal and other commodities, to provide for the inspection and sealing of weights and measures, to enforce the keeping and using of proper weights and measures by vendors, and to license and regulate public scales.

This ordinance has twice been reviewed by the Supreme Court of Illinois and its validity upheld, once in the instant case and once in the year 1924 in the case of *City of Chicago* v. *Wisconsin Lime & Cement Co.* 312 Ill. 520, 144 N. E. 3. The *Wisconsin Lime & Cement Co.* case was taken to this court by writ of error and extensive briefs filed by the parties upon the constitutionality of the ordinance. By a *per curiam* opinion the case was dismissed for want of jurisdiction. *Wisconsin Lime & Cement Co.,* Plaintiff in error, v. *City of Chicago* (No. 141) 270 U. S. 626. The *Wisconsin Lime & Cement Co.* case was quite similar in its facts to the case at bar for the reason that that com-

pany maintained, in addition to its yard in Chicago, a coal yard in Oak Park, Illinois, from which it delivered considerable quantities of coal to Chicago consumers.

Hauge now seeks a further review by this court and claims that he is entitled to invoke the jurisdiction of this court upon the ground that the ordinance in question is violative of the first section of the Fourteenth Amendment to the Constitution of the United States.

Appellee, City of Chicago, has filed its statement of matters and grounds making against the jurisdiction of this court, also its motion to dismiss or affirm. By its order entered October 12, 1936 this court postponed further consideration of the question of jurisdiction and of the motion to dismiss or affirm to the hearing on the merits. In the statement opposing jurisdiction and in the motion to dismiss or affirm appellee has pointed out that this court might properly decline to take jurisdiction of the appeal. Though not reargued herein appellee relies upon the grounds set forth in its statement and motion and regards them as sufficient to warrant this court in dismissing the appeal or affirming the judgment of the Supreme Court of Illinois.

The lengthy statement of the case set forth in appellant's brief is argumentative, distorted and contains much that is misleading and highly improper. While we regret the necessity of correcting misstatements and pointing out overstatements it is felt that this must be done in order that this court may see the actual case.

On page 7 and 8 appellant sets forth the contents of a petition for rehearing presented to the Supreme Court of Illinois by certain parties living in the vicinity of the Morris mine who sought to appear as *amici curiae* after the Illinois Court had rendered its decision. Their application was denied. (R. 61) Yet counsel for appellant have desig-

nated this petition for printing and in their statement of the case set forth the contents of this petition and attempt to give it evidentiary force and value. It has no evidentiary value and, furthermore, contains statements which are patently false. For example, it states that there are no public weighmasters supervising scales in Chicago except in coal yards of competitors. The answer to this is that it is apparent on the face of the ordinance attacked that there are numerous other public weighmasters weighing many other commodities delivered in load lots whose scales are accessible to appellant. Furthermore, there is nothing in the record to support the statement that any coal yard will not permit the dumping of coal, and nothing in the record to support any one of the other extravagant statements contained in this petition. Manifestly this extraneous petition and the arguments made therein have no proper place in the record of this case. They do not furnish grounds upon which appellant can predicate an argument or a proper basis *for any judicial opinion or decision.* Much of the opinion of the dissenting justices of the Illinois Court set forth in appellant's statement of the case is based upon the extravagant and wholly unsupported statements contained in this rejected petition for rehearing and for this reason the dissenting opinion is not convincing.

Throughout his brief appellant speaks of this case as involving the business of delivering coal trucked direct from a mine located in Morris, Illinois, to a purchaser in Chicago, whereas in reality it involves a Chicago coal dealer's business in selling and delivering coal to a Chicago purchaser, the dealer utilizing the services of a nonresident trucker to haul the coal from Morris to Chicago. The legal right of nonresident mine owners and Chicago consumers to deal directly with each other is not involved

in this case. The transaction here is one between Burgess and Tresca, both residents of Chicago.

Appellant tries to create the impression that the enforcement of the ordinance requires the reweighing of coal which has already been weighed and its correct weight certified by a responsible authority in manner calculated to protect the purchaser. There was no public weighmaster's scale at Morris; all there was there was a scale maintained by the Morris Coal and Mining Company, which scale had been inspected as to mechanical accuracy under the Illinois Weights and Measures act. The statements made by appellant to the effect that the coal delivered by appellant Hauge had been "weighed at the mine in accordance with State statutes" and "weighed over State-inspected scales" are misleading; likewise the statement that a "mine weighmaster" certified the tare weight. The undeniable fact is that the coal was not weighed by a public weighmaster nor sold nor delivered with any public weighmaster's weight certificate. The ordinance before the court which requires a weighing by a public official and the issuance of a bonded public weighmaster's certificate of weight is the only protective measure which effectively guards the purchaser. When the weighing of the coal by a Chicago public weighmaster prescribed by the ordinance is the first weighing by a public weighmaster it is not fair for appellant to speak of this weighing as a "reweighing."

The statement contained on the delivery ticket issued to Burgess by the Morris Coal and Mining Company (R. 11) reading "Weighed by NHB, Public Weighmaster," when read with the purported certificate immediately following, if used to convince Burgess or Burgess' Chicago customer of the accuracy of the weight of the coal, works a fraud upon the purchaser. This certificate states that the coal "was weighed by a public weighmaster and the

seal attached hereto is a recognized authority of accuracy as prescribed by section 4204 of the Chicago Municipal Code of 1922, as amended Dec. 16, 1925 and Jan. 21, 1926.' Section 4204 was a section of the 1922 code, long since superseded by the Revised Chicago Code of 1931, and the record in the case at bar is conclusive as to the fact that the coal delivered by appellant Hauge had not been weighed by a public weighmaster and was not delivered with a public weighmaster's certificate of weight. (R. 10) As already said, the record merely shows that the coal consigned to Burgess was weighed at Morris on a State-inspected scale maintained by the Morris Coal and Mining Company for its own convenience. Both the city ordinance and the state law were violated in Hauge's delivery to Tresca. There is not even a delivery ticket in evidence to which Hauge can point as complying with the state law. Manifestly he may not rely upon the ticket furnished Burgess.

On page 4 appellant states that "the consumer in Chicago buys this coal from the mine either directly or through a local dealer, agent or broker." Constantly throughout his brief appellant attempts to present the case of the Morris Coal and Mining Company instead of the actual case of appellant Hauge. There is presented to the court for decision only the case of appellant Hauge which, as already stated herein, involves a transaction between Burgess, a Chicago coal dealer, and Tresca, his Chicago customer, Burgess utilizing the services of Hauge in delivering the coal to Tresca.

The statement found on page 5 to the effect that "the complaining mine companies cannot obtain weighmaster's certificates," which statement also appears in the dissenting opinion of the state court, finds no support in the

record. There are no "complaining mine companies" parties to the suit.

The statement on page 6 purporting to set forth the testimony of the president of the Morris Coal and Mining Company to the effect that that company's coal is involved and that it has had no complaints from its customers as to short weights is clearly immaterial to the issues involved in appellant Hauge's case.

SUMMARY OF ARGUMENT.

I.

The provisions of the ordinance, its history, and the purpose sought to be accomplished by it.

Sections 2947 and 3623 of the ordinance provide that every load of any commodity sold in load lots by weight, delivered by truck within the city, shall be weighed by a public weighmaster whose certificate of weight shall be delivered to the purchaser before any of the commodity is removed from the vehicle and that no weighmaster shall state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle.

Short weighing is an offense under other sections of the ordinance but such sections would be ineffectual without the means of control afforded by the provisions in controversy; the latter are absolutely essential to prevent short weighing and other frauds.

Illinois has no statute providing for weighmasters; the State inspects scales as to mechanical accuracy but makes no attempt to supervise the weighing; this function is left to the municipalities. Even though the scale be accurate

the purchaser is not protected if the weighing is not supervised.

Prior to the enactment of this ordinance conditions in Chicago is regard to short weighing, the use of padded weight tickets, the substitution of a different kind of coal from the coal billed, and the mixing of an inferior grade with coal of a superior grade and quality, had become so bad that many reputable dealers had asked protection from such unfair competition; without this salutary ordinance these frauds would again be unrestrained.

II.

There is no justiciable controversy involved in this case; the existence of the evil of short weighing being admitted, the method of dealing with it is a legislative and not a judicial question.

Appellant admits that the evil of short weighing exists, he admits that the city has power to suppress it, and he does not deny that the ordinance in question is designed, and directly tends, to suppress such evil. His sole complaint is that he thinks some other method of suppression would be better; he complains because he himself has created a situation where compliance with the ordinance causes him, he says, additional expense and he urges that the ordinance is therefore unreasonable on the sole ground of causing such additional expense—an expense due solely, if it exists, to the method of delivery he has himself chosen to adopt.

He suggests that in lieu of the present ordinance, a different one should be enacted which would permit either (a) that the tare weight be determined once and for all in advance and stenciled on the vehicle, or (b) that the weighing be split into two operations so that the gross

weight might be obtained before, and the net and tare weights after delivery to the customer.

Neither suggestion is practical: The first presupposes that the tare weight remains constant, which it does not. The tare weight of a truck is made up of the truck itself and many other items including spare tires, tow chains, driver and helper, water, oil, gasoline, sideboards, dividing boards for split loads, wheelbarrows, and planks for runways on lawns; moreover the tare weight may be increased as much as 500 pounds by accumulated snow, ice, or mud on and under the fenders and running gear. The total possible variation in these items is over 2000 pounds. The items are all subject to frequent change according to the needs of the moment or the weather.

The second suggestion is equally objectionable; with an interval of time between the two weighings, a time during which the driver is not under the surveillance of the weighmaster, the opportunity for fraud by manipulating the items making up the tare weight, by introducing or removing spurious heavy objects, or even by the mere consumption of gasoline (twenty gallons weigh over 150 pounds), is obvious.

In any event appellant has raised a purely legislative question which the court will not decide as it is not concerned with whether or not the regulation is the best or most effective that could be employed, or with the wisdom, harshness, expediency, practicability, injustice, or policy of laws.

Appellant is not engaged in a new business but in the same business that others have been engaged in for years, the retail delivery of coal by truck; appellant offers no evidence to show that he will henceforth be unable to obtain coal from the mines for delivery or what proportion of

his deliveries coal constitutes or that he will be unable to compete with other truckers or dealers under this ordinance.

The question here is really only one of transportation.

III.

The ordinance does not violate Section 1 of the Fourteenth Amendment to the Federal Constitution.

This court will accept the decision of the Supreme Court of Illinois as to the construction of the ordinance, as to the power of appellee to enact it, and as to the findings of fact such as that the sale of the coal took place in Chicago and that appellant was the agent of the seller.

The ordinance is a valid exercise of the police power; this court has several times upheld similar legislation regulating weights and measures and public weighing.

The ordinance operates equally upon all who are subject to it.

A review of the decisions of State courts shows that the power of the State or its agencies to protect the buyer from shortweighing by compulsory weighing on public or on licensed scales has been sustained in every instance; the only occasions on which such statutes or ordinances have been held invalid have been the result of some particular objectionable feature unconnected with the theory and principle of such legislation.

The extravagant contention that enforcement of the ordinance will destroy appellant's business is without support in the record; appellant has adduced no evidence that his trucking business will be injuriously affected by such enforcement.

If the ordinance were not enforceable against appellant then the purchaser would have no protection. The mine. owner not only disclaims responsibility for appellant but is beyond the city's reach.

The cases cited by appellant present entirely different situations and are not controlling.

As the ordinance stands it does not discriminate for or against nonresidents; to recognize the demand of appellant would be to discriminate against the local truckmen and dealers in Chicago in favor of nonresidents.

It is of greater importance to the consumer to get full weight than to get cheap coal; the cheap coal would cease to be cheap if its weight were short.

In conclusion, the ordinance is not so unmistakably and palpably in excess of legislative power as to be void under the Fourteenth Amendment.

ARGUMENT

I.

The provisions of the ordinance, its history, and the purpose sought to be accomplished by it.

The ordinance under consideration was enacted pursuant to express grants of authority conferred by the legislature of Illinois in and by Sections 54, 55, 56, 66, 91 and 102 of Article V, Chapter 24, Illinois Revised Statutes. It provides *inter alia,* for the creation of an executive branch of the city government to be known as the Department of Weights and Measures (R. 27), for the appointment of a head of the department (R. 28), for the appointment of public weighmasters and their bonding (R. 38), and covers the matters of scales, charges for weighing and the issuance of weight certificates. (R. 39, 40) Section 2947 relates to commodities sold in load lots and delivered by truck and provides that all such loads shall be weighed by a public weighmaster whose certificate of weight shall be delivered to the purchaser before the vehicle is unloaded. (R. 29)

Section 3623, entitled "Weight certificates" provides that in no case shall any public weighmaster state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight as specified.

The only real protection which Chicago purchasers of truck load lots of coal and other similar bulky commodities sold in load lots by weight have against the evil of short weighing and the use of padded weight tickets is afforded by this ordinance now before the court. It is true that there are ordinances and state statutes in force in Chi-

cago which make short weighing an offense and penalize it. Yet of what avail are such ordinances and statutes when there are no means of detecting the short weigher or of securing evidence that will lead to his conviction or of preventing him from continuing his nefarious practices? As the Supreme Court of Illinois said in the case of *City of Chicago* v. *Wisconsin Lime & Cement Co.* (1924), 312 Ill. 520, 522, 144 N. E. 3, speaking of the state statute making sale by false weights or measures a criminal offense:

> "Purchasers of a commodity by weight already had that protection but no way to enforce it. In buying ordinary articles the buyer generally may see the article weighed or have the means at hand to ascertain whether it is short weight, but when applied to load lots it was and is impossible for the purchaser to determine the weight of the load. The purpose of the ordinance was most commendable and essential to secure to the purchaser the weight of the commodity purchased and paid for."

No such protection is afforded by the statutory law of Illinois as Illinois has no public weighmaster statute. That the coal delivered by Burgess through his trucker, appellant Hauge, was weighed on state-inspected scales at Morris, Illinois, means very little. The coal was not weighed by a public weighmaster or sold or delivered with any public weighmaster's weight certificate.

The Supreme Court of Illinois in the case at bar held (R. 48):

> "It is immaterial to the issues here that the coal in question was weighed outside of the City of Chicago on state-tested scales. The Weights and Measures act does not repeal, supersede or to any extent modify the right of a municipality to adopt an ordinance regu-

lating the method of ascertaining the correctness of weights and measures."

Neither does the Illinois Weights and Measures act, as contended by appellant, furnish adequate safeguards to the Chicago purchaser of coal against short weights. The requirement of the state statute that a delivery ticket showing gross, tare and net weight be surrendered upon demand to any city inspector of weights and measures for his inspection and be delivered to the purchaser at the time of delivery, does not afford adequate protection. The Illinois statute does not require the delivery of any ticket before unloading the coal. It simply says that a delivery ticket shall be delivered at the time of delivery, which might be before the truck leaves the customer's premises but after the coal is stored away in a bin in the customer's basement or dumped on the ground. Likewise the exhibiting of a delivery ticket to a city inspector after the coal had been dumped or stored away would not enable the inspector to weigh the coal in its original condition. One of the most common practices of dishonest coal dealers which was prevalent in Chicago before the enactment of this ordinance was that of using two delivery tickets. For example, a purchaser who had ordered five tons would be sent a load containing four and one-half tons. If the driver were intercepted by a city inspector he would produce a delivery ticket for the true weight of the coal carried and explain to the customer that his truck was old or its springs weak and that he would be back again with the extra half ton. If he got through and made the delivery to the purchaser without interference, he would deliver the padded or false ticket showing a net weight of five tons, and the customer would be defrauded out of a half ton of coal. It will, therefore, be seen that in order to cope successfully with the device of double tickets it is necessary

that the driver be required to deliver a certificate of true weight issued by a bonded official who might lose his license and forfeit his bond if he issued a false certificate.

Another difficulty which confronts the city and shows that the ordinance under consideration in the case at bar is indispensable is this: In the case of *City of Chicago* v. *Kautz*, (1924), 313 Ill. 196, 144 N. E. 805, the Supreme Court of Illinois came to the surprising conclusion that the city inspectors had no power to require the re-weighing of a load of coal en route to a customer, which coal, had once been weighed by a public weighmaster, and that Section 986 of the Chicago Municipal Code of 1922, which purported to give such power, was invalid. Section 986 became Section 3342 of the Revised Chicago Code of 1931, which appellant, on page 9 of his brief, relies upon to convince this court that Section 2947 is not necessary. The opinion of the Illinois Supreme Court in the *Kautz* case (p. 203) makes it clear that that court in reaching the conclusion it did, assumed that the public in Chicago is protected by the ordinance now before this court in the case at bar, and virtually finds that the protection given by that ordinance makes the protection afforded by Section 986 superfluous. As a matter of fact, in view of the conclusion of the Illinois court in the *Kautz* case, the protection afforded by the ordinance now being considered has become not merely desirable but absolutely necessary and indispensable if the buying public in Chicago is to be safeguarded from the notoriously prevalent and well-organized swindling by habitual short weighers in the coal and building material businesses. If this ordinance should be held unconstitutional there will be nothing left in so far as truckers like Hauge are concerned but an empty prohibition of short weighing and a meaningless penalty.

This, we believe, demonstrates the necessity of the ordinance and fully answers appellant's contention that the ordinance is unnecessary, and therefore unconstitutional because it is unnecessary. If it does not, we then make the further point that the municipal legislative body and not appellant, and not even the courts, is the judge of the necessity for regulation. This court has repeatedly held that the legislature may select the means which it deems to be appropriate to the end to be achieved. The cases on this point will be found cited under Point II of this brief. So we contend that if in the judgment of the City Council of the City of Chicago, in order to cope with the practices of short weighing of bulky commodities sold in truck load lots by weight, it is necessary to establish public weighmasters and prescribe the use of public weighmasters' certificates of weight, and also to require the weighing of the vehicle empty as well as the gross load, in order to arrive at the true net weights, appellant is not in a position to defeat the ordinance upon the ground that in his judgment some other regulation should have been adopted. Neither is he in a position to ask this court to substitute its judgment for that of the municipal legislative body.

Prior to the enactment of this ordinance conditions in the City of Chicago in regard to short weighing and the use of padded weight tickets had become so bad that the coal dealers themselves had asked for protection from the city. The conditions were such that either the dealers must get some protection or else resort to the same dishonest practices that their competitors were using or else go out of business. Repeated cheating was going on. So the ordinance was passed in 1922 and became effective in 1923 to remedy the condition by prescribing that load lots shall be weighed on public weighmasters' scales and delivered with public weighmasters' weight certificates, thus making

the weigher personally responsible under his bond and subject to the revocation of his license for dishonesty in weights. This historical background of the ordinance was brought out in the case of *City of Chicago* v. *Wisconsin Lime & Cement Co.* (1924), 312 Ill. 520, 144 N. E. 3, 270 U. S. 626. On page 521 of its opinion the Supreme Court of Illinois said:

> "The ordinance was designed to protect the purchasing public against what has been universally regarded as a widespread evil in the selling of commodities in load lots by weight and it contained effective means for the prevention of the evil. It was proved at the trial that the conditions in Chicago in regard to short weighing, the use of padded weight tickets, the substitution of a different kind of coal from the coal billed, and the mixing of an inferior grade with coal of a superior grade and quality, had become so bad that many reputable dealers had asked protection from such unfair competition."

The ordinance is confined in express terms to commodities sold in load lots by weight and delivered in the city. It is directed at such commodities as coal and similar articles sold in load lots which, by reason of their bulky nature, offer unusual opportunity for fraud and imposition upon the purchaser.

The method of protection provided in the ordinance is fundamentally the regulation of the weighing of bulky commodities by a system of licensing. It establishes a licensed public weighmaster who is bonded and whose license is subject to revocation by the Mayor. Any resident of the city may become a public weighmaster and the fact that such resident is a coal dealer does not preclude him or his employee from qualifying as a public weighmaster and from maintaining public scales in his yard for his convenience

in complying with the ordinance. It furnishes protection to the purchaser by provisions which necessarily tend to bring about honest weighing, also by providing means for detecting not only the short-weighter but also the person who defrauds the purchaser by substitution of inferior for superior grades. The requirement as to the delivery to the purchaser of a public weighmaster's weight certificate at the time the delivery is made and the coal paid for by the customer is most essential. In estimating the protection afforded the purchaser by this certificate it should be kept in mind that outwardly there is never anything suspicious about a load of coal or other bulky commodity so as to attract the attention or arouse the curiosity of a law-enforcing official. In the case of small articles sold over the counter the sense of weight or of touch frequently furnishes a sufficient basis for the suspicion of short weight. At any rate the weights can be easily verified on other scales. It is not so with a load of coal. There is nothing suspicious about a ten-ton truck which is only half full; the dealer may be filling a legitimate five-ton order or he may be delivering the first five tons on a fifteen-ton order. It is only when he or his trucker delivering the coal is required to have some authoritative certificate purporting to describe the load and to furnish the basis on which it is billed that it is possible to detect fraud. But even this is not enough. In order to cope successfully with the device of double tickets—one of which represents the correct weight, and the other, a padded weight, to be used as the occasion requires—it is necessary that the trucker be required to deliver his weight certificate to the purchaser at the time of delivery and before unloading the coal.

In this case the Supreme Court of Illinois said (R. 49):

> "The opportunity to defraud the consumer in the sale of coal in load lots is great and the consumer has

no adequate way to protect himself against being cheated. The delivery of true weights of coal to the consumer is a matter clearly related to the public welfare and the city has the right to adopt reasonable ordinances therefor."

The foregoing is, we believe, sufficient to demonstrate that the ordinance which appellant seeks to break down is a salutary measure, that its purpose and necessary effect is to furnish buyers with a much needed protection from imposition and fraud by short weights in bulky commodities and incidentally to protect honest dealers from unfair competition.

II.

There is no justiciable controversy involved in this case. The existence of the evil of short weighing being admitted, the method of dealing with it is a legislative and not a judicial question.

Appellant concedes that the delivery of short weights of coal constitutes a fraud upon the purchaser and is an evil which should be suppressed. He admits that the city has power to adopt measures which are directed toward the suppression of such evil and he does not, indeed he cannot, deny that the ordinance here involved is in fact directed at such suppression and that it does in fact reasonably tend to accomplish its purpose.

Nowhere does appellant charge or show that the ordinance is in and of itself discriminatory or that it singles out certain members of the same class for special treatment; he does not even claim that the manner in which it is administered is discriminatory. Appellant simply contends that he has a right to conduct his business in any manner which is agreeable to him and that since, out of

several other methods of conducting it, he has chosen one which, in combination with the ordinance, entails upon him a small additional expense, therefore the ordinance is unreasonable and oppressive. But the alleged hardship does not arise out of the ordinance or its administration, but out of a situation of his own devising.

It cannot be too strongly emphasized that appellant is not quarreling with the power to enact the ordinance; he is not quarreling with the manner of its administration; and he is not claiming that it is unsuited to its purpose. All he claims is that the ordinance should be redrafted and the method of enforcement changed so that his deliveries will be more convenient and slightly less expensive. As pointed out by Mr. Justice Herrick, in the opinion of the Supreme Court of Illinois in this case, the appellant, far from being discriminated against, is himself asking for special treatment (R. 50). Appellant contends that even though the ordinance is satisfactory to everybody else, yet if it makes his deliveries more expensive than it would if it were drafted differently, then it is unreasonable and void unless and until it is changed to suit his particular business.

Appellant's entire case rests upon the following suspicious syllogism: 1. The ordinance, in its practical operation in this particular case, requires the unloading and reloading of the truck during the course of delivery thereby increasing slightly the ultimate cost to the consumer. 2. The ordinance would be equally effective to accomplish its avowed purpose were it to permit either (a) that the tare weight be determined once and for all in advance and stenciled on the vehicle, or (b) that the weighing be split into two operations so that the gross weight might be obtained before and the net and tare weights after delivery to the customer, thereby avoiding such alleged increase in

ultimate cost. 3. Since the legislative body which enacted the ordinance did not adopt the method the least burdensome to appellant or the best or most effective means, in the opinion of the appellant, for accomplishing its purpose, the ordinance is unreasonable and void although concededly enacted in pursuance of the legitimate exercise of the legislative power vested in that body.

Propositions one and two lie in mere statement and have not been proved; but even were they true, proposition three is a *non sequitur* and is not the law.

As to proposition one, the only reason appellant would be required to unload and reload his truck is because he insists on loading the truck before the weighing which is his own choice not that of the ordinance.

As to proposition two, a moment's consideration will readily demonstrate that a stenciling of the tare weight on the vehicle is utterly impractical and that a weighing split into two operations, with an interval of time in between during which the trucker is not under the observation of the weighmaster, is neither practical nor nearly as effective to prevent fraud as the single operation envisaged by the ordinance.

The impractical suggestion that the tare weight be stenciled on the vehicle in advance assumes that the tare weight of a truck will stay constant, when, as a matter of fact, modern trucks shift their equipment to meet their hauling needs and each shift in equipment will change the tare weight. For instance, mine truckers commonly haul five tons of coal to Chicago customers by equipping the body of the truck with high sideboards of heavy planks, which increase the tare weight by approximately 350 pounds, but the same trucker the following day, may haul a three-ton order, which does not necessitate the use of sideboards and they are, therefore, naturally left off.

It may fairly be assumed that two spare tires weigh 100 pounds each, that they are often carried but are sometimes left off for repairs, and that one may be left off and the other carried, making a change of 100 to 200 pounds in the tare weight. It may also be assumed that tow chains weighing approximately 80 pounds are sometimes carried and sometimes not. A truck in slushy weather may pick up partially melted snow with its tires and throw this under the fenders and running gear, where it often freezes instantly, because of the velocity of the truck against a strong cold wind, and a change of 500 pounds in tare weight is quite common under these conditions. Considerable change also occurs in rainy weather, particularly if the truck is driven over mud roads.

Tare weight of a truck, then, is made up of the truck itself and many other individual items, including spare tires, tow chains, driver and helper, gasoline, sideboards, dividing boards for split loads, wheelbarrows, and planks for runways on lawns. Much of this tare weight is flexible and subject to frequent change, a fact which makes the stenciling of a constant tare weight on the side of a truck impractical.

The method proposed by appellant would permit the return of the common frauds which prevailed before the passage of Section 2947. For example a truck driver knows that the easiest way to perpetrate a fraud and the most unlikely to be discovered, is the juggling of the tare weights. Moreover, the driver knows that he can give plausible excuses if shortweight is discovered, due to a change in tare weight. As an excuse he will allege a mistake or oversight on his part in forgetting that he had made a change in the tare weight by eliminating or adding some of the equipment.

The other method suggested by appellant—that only the gross weight be obtained before delivery and that the net weight be ascertained after delivery—is equally objectionable. This would obviously open the door to various fraudulent devices. Assume that the tare weight of a truck and its equipment when it arrives at the scales is 9000 pounds and that it contains 9000 pounds of coal. Assume that only the gross weight—18,000 pounds—is taken. The trucker then drives away, makes his delivery, and returns to the scale for a tare weight but, in the meantime, has removed from the vehicle two spare tires (200 pounds), the tow chains (80 pounds), the sideboards (350 pounds), the dividing boards (300 pounds), and has consumed ten gallons of gasoline (80 pounds), or a total weight of 1010 pounds. The weighmaster weighs for the tare weight and records: Gross weight, 18,000; tare weight 7990; net weight 10,010 pounds. The certificate will show a delivery of five tons whereas the purchaser in fact received only four and one-half tons and was shortweighted one-half ton.

Or suppose that a trucker places spurious heavy objects in the bottom of the truck covering them up with sacks of coal; having obtained a high gross weight certificate, he would then deliver the coal, remove the spurious objects, and obtain a low tare weight certificate; he could thus show a high net weight delivery which would in fact be false. This type of fraud would be difficult and improbable where all the weights (gross, tare, and net) were obtained in one operation. Or, again, suppose a truck with a water capacity of five gallons, an oil capacity of five quarts, and a gasoline capacity of twenty gallons. A truck fully supplied with these materials would weigh over two hundred pounds more than a truck without them. These items could easliy be consumed, changed, or removed.

The City of Chicago does not claim that fraud is impossible under the ordinance as now drawn but it does claim that fraud is now much more difficult of accomplishment than it would be under the proposed ordinance which appellant seeks to have enacted by the courts.

Without Section 2947, if an inspector of the Department of Weights and Measures were to approach a driver who was delivering coal, and were to ask him how much coal he was delivering, the driver could easily state correctly the amount that was on the truck, even though the purchaser might declare that he had ordered one ton more than was being delivered, indicating that the driver intended to shortweight the purchaser. The driver's reply could easily be that his tires were getting old and weak, or his springs were weakening, and he could not carry the full amount ordered, so that an additional ton was to be brought on a second haul. The inspector could reweigh the load, but could not prove a shortweight case. The remedy for this condition was the passage of Section 2947.

There is another consideration affecting this problem: Since the owners declare that they deliver the coal to the trucker at the mine and have no further responsibility (R. 18) the only penalty that could be assessed for shortweighing would be against the trucker; he engages only intermittently in business in Chicago and his reputation would not be damaged by a shortweight conviction to the same extent as that of a Chicago dealer. The local Chicago dealer is dependent upon the confidence of his customers for his repeat business and can suffer greatly from a conviction for shortweighing. Therefore he is zealous to prevent inaccurate weighing.

However if appellee were wrong as to both the foregoing propositions and if it could be said that the ordinance pro-

posed by appellant would be equally or even more effective to prevent fraud, still it is not the law that the present ordinance is therefore invalid.

Appellant has raised a purely legislative question which the courts will not decide. His contention has been completely answered by this Court in *Booth* v. *Illinois,* (1902) 184 U. S. 425 at 429 and 431-432, a case involving an Illinois statute declaring illegal all options to sell or buy grain at a future time. Mr. Justice Harlan, delivering the opinion of the court, and answering the contention that the statute forbade a lawful calling along with the unlawful, said:

> Page 429. "A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances which attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law * * *"
>
> Pages 431-432. "The statute here involved may be unwise. But an unwise enactment is not necessarily, for that reason, invalid. It may be, as suggested by counsel, that the steady, vigorous enforcement of this statute will materially interfere with the handling or moving of vast amounts of grain in the

West which are disposed of by contracts or arrangements made in the Board of Trade in Chicago. But those are suggestions for the consideration of the Illinois legislature. The courts have nothing to do with the mere policy of legislation."

Appellant's case is less strong than that presented to the court in the foregoing grain futures case. There is no interference with the movement of coal, there is no prohibition against moving coal into the city; appellant is simply required to conform to reasonable measures for the prevention of fraud. The only interference appellant can show is with his particular method of doing business, not with the business itself. Under the law of the case cited, appellant's method of doing business could be prohibited altogether if that were necessary for the prevention of fraud.

In *Burroughs and Cannon* v. *United States,* (1934) 290 U. S. 534 at 547-548, this Court, in upholding the Federal Corrupt Practices Act, said through Mr. Justice Sutherland:

> "*The power* of Congress to protect the election of President and Vice President from corruption *being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress.* If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." (Italics supplied.)

In *Champion* v. *Ames* (*Lottery Case*), (1903) 188 U. S. 321, 353, Mr. Justice Harlan, delivering the opinion of

the court upholding federal legislation prohibiting the carriage of lottery tickets in interstate commerce, said:

> "In determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, *such regulations may not be the best or most effective that could be employed.*". (Italics supplied.)

To the same effect: *Metropolis Theatre Co.* v. *Chicago,* (1913) 228 U. S. 61, 69; *Atlantic Coast Line Railroad Company* v. *Georgia,* (1914) 234 U. S. 280 at 287-288.

A North Dakota statute required that all lard not sold in bulk be sold in containers holding a specified number of pounds or multiples thereof and forbade fractional numbers. Armour & Company was convicted and fined for selling a container of lard holding more than two and less than three pounds. This statute was attacked as putting an unreasonable, unnecessary burden on the company and causing additional expense. In *Armour & Company* v. *North Dakota,* (1916) 240 U. S. 510, this Court upheld the law and said (Mr. Justice McKenna, at page 513):

> "Nor do the courts have to be sure of the precise reasons for the legislation or certainly know them or be convinced of the wisdom or adequacy of the laws."

In *Rast etc.* v. *Van Deman & Lewis Company,* (1916) 240 U. S. 342, a case involving a Florida license tax on merchants using profit sharing coupons and trading stamps, this court, upholding the statute and quoting with approval from an earlier case, said (Mr. Justice McKenna, at page 366):

> "It by no means is true that every law is void which may seem to the judges who pass upon it excessive,

unsuited to its ostensible end, or based upon conceptions of morality with which they disagree."

The harshness of legislation, or the hardship it may cause, afford no reason for considering it to be unconstitutional: Mr. Chief Justice Hughes in *Norman* v. *Baltiment & Ohio Railroad Co.*, (1935) 294 U. S. 240, 306. In accord: *Powell* v. *Pennsylvania*, (1888) 127 U. S. 678, 686; *Missouri Pacific Railway Company* v. *Humes*, (1885) 115 U. S. 512, 520, quoted with approval in *New York & New England R. R. Co.* v. *Bristol*, (1894) 151 U. S. 556, 570; *Barbier* v. *Connolly*, (1885) 113 U. S. 27, 32; *Twining* v. *New Jersey*, (1908) 211 U. S. 78, 106, *Schmidinger* v. *Chicago*, (1913) 226 U. S. 578, 588.

With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal: Mr. Justice Roberts in *Nebbia* v. *New York*, (1934) 291 U. S. 502, 537, (upholding a New York statute and the regulations issued thereunder fixing the prices at which milk could be sold). In accord: *Home Building & Loan Association* v. *Blaisdell et al.*, (1934) 290 U. S. 398, at 447-448; *Green et al.* v. *Frazier etc. et al.*, (1920) 253 U. S. 233, 240; *Hamilton etc.* v. *Kentucky Distilleries & Warehouse Co.*, (1919) 251 U. S. 146, at 161-162; *Brushaber* v. *Union Pacific Railroad Company*, (1916) 240 U. S. 1, 25; *Waugh* v. *Board of Trustees of the University of Mississippi*, (1915) 237 U. S. 589, 597; *Fox* v. *Washington*, (1915) 236 U. S. 273, 278; *German Alliance Insurance Co.* v. *Lewis etc. of Kansas*, (1914) 233 U. S. 389, 417; *Brodnax* v. *Missouri*, (1911) 219 U. S. 285, 293; *McCray* v. *United States*, (1904) 195 U. S. 27, 54.

Appellant, on page 21 of his brief, contends that the requirement that the tare weight be officially determined

prior to delivery is inferentially recognized as unreasonable by the Chicago City Council itself, because under all other sections of the ordinance dealing with the verification of a tare weight after the commodity is loaded such tare weight may be determined after the delivery of the load to the purchaser; and he cites Sections 2939, 2950, 2951, 3342 and 3445 (R. 28, 29, 30, 33, 37). It seems hardly necessary to state that the situation covered by Section 2947 (the one here involved) and the situation covered by the other sections cited by appellant are totally different and should be treated differently. In passing, it may be noted that the purpose of the sections cited by appellant is not, as stated by him, to verify the tare weight, but to verify the net weight; that in the situation covered by the sections cited, the vehicle and load have already been separately weighed by a bonded weighmaster and the driver is already in possession of the weighmaster's certificate showing the tare, gross and net weights; and that it may reasonably be presumed that such certificate of a bonded weighmaster was correct at the time it was given. The purpose of the additional sections cited by appellant is to discover any short weight which may have been effectuated *after* the giving of the certificate. When a city inspector picks up a truck in the course of delivery it remains under his constant supervision during the obtaining of the gross weight, during the delivery to the customer, and during the obtaining of the net weight. It is therefore immaterial in what order the different weights are obtained as the inspector's continued presence prevents the accomplishment of any further fraud. Since the truck is already loaded when he finds it and since it remains under his surveillance thereafter, it is reasonable for the ordinance to permit delivery before checking the net weight. Since further fraud is, at this point, impos-

sible, a dumping to obtain the tare weight and a reloading for delivery are unnecessary.

Section 2947 (R. 29), which is the section appellant attacks envisages a totally different situation. Here, for the proper prevention of fraud, the tare, gross, and net weights must be determined together. As already pointed out, if a driver were permitted to obtain the different weights at separate times, with an interval during which he is under no one's surveillance, he would have an opportunity to impose upon the weighmaster in a manner not at present possible. Under the existing system, where all the weights are obtained at one time under the weighmaster's uninterrupted supervision, the weighmaster's certificate is impeccable and it is impossible for him unknowingly to give a certificate which shows a false net weight. Short weights may be effectuated *after* the certificate is given and it is *here* that the other sections come in; their purpose is to prevent fraud *after* the certificate has been obtained and during the process of delivery. The purpose of Section 2947 is to provide for a reliable and authentic weight certificate prior thereto, a wholly different matter requiring a different rule. Clearly there is no inference that because the city enacted other sections applying to a different situation, it thereby admitted that Section 2947 is unreasonable.

Appellant also contends (Appellant's Brief, pages 27 and 28 *et seq.*) that he is engaged in a different business from that of the other coal dealers. It is obviously the same business—the retail delivery of coal—pursued in a different manner. To say that the use of trucks instead, for example, of freight cars, changes the retail coal business into some other business (to which appellant gives no name) is specious. Appellant claims that trucking coal is a new business; this Court may well take judicial notice of the

fact that coal has been delivered by truck for a great many years. Appellant claims that if the ordinance is enforced and the cost of coal delivered by him is increased fifty cents to a dollar a ton, his business will be destroyed. Presumably he means that the coal mines will stop using trucks in favor of railroads or otherwise deprive him of business. There is not a particle of evidence to support such a conclusion; there is no evidence that coal is the only commodity he trucks or even that coal deliveries constitute a large proportion of his business; nor is there any evidence that the increase in cost claimed by appellant to result from the ordinance, will disable him from competing with other coal dealers or raise the ultimate price of his coal above that of competing coal. Appellant may be a mere laggard in the race. In *Hegeman Farms Corporation* v. *Baldwin et al.*, (1934) 293 U. S. 163, 170, 171, Mr. Justice Cardozo, delivering the opinion of the court, said:

> "The Fourteenth Amendment does not protect a business against the hazards of competition. . . . .
>
> ". . . . . True, of course, it is that the weaker members of the group (the marginal operators or even others above the margin) may find themselves unable to keep pace with the stronger, but it is their comparative inefficiency, not tyrannical compulsion, that makes them laggards in the race. Whether a wise statecraft will favor or condemn this exaltation of the strong is a matter of legislative policy with which courts are not concerned."

Appellant's claim that his business will be seriously affected, to say nothing of destroyed, is absolutely unsupported by the record.

The Supreme Court of Illinois correctly perceived the gist of appellant's case when it said that the question here is really only one of transportation. The court said through Mr. Justice Herrick (R. 50, 52):

> *"The circumstance that has brought about the controversy here is, after all, one of transportation. . . . .*
> " . . . . . There is no discrimination made by the ordinance against the defendants. *They have merely elected to do their business in a manner more convenient to them* and different from the method prescribed by the ordinance. . . . ." (Italics supplied.)

The foregoing indicates a clear perception on the part of the Supreme Court of Illinois that this case raises no justiciable question and that appellant's attack on the ordinance goes only to its wisdom, expediency, or justness, matters lying in the sole discretion of the legislative body. It is respectfully submitted that under the law laid down in the cases cited above the decision of the Supreme Court of Illinois is correct and should be affirmed.

III.

The ordinance does not violate Section 1 of the Fourteenth Amendment to the Federal Constitution.

Under this point we shall show that the ordinance does not deny to appellant the equal protection of the laws or deprive him of liberty or property without due process of law in violation of section 1 of the Fourteenth Amendment.

Of course, so far as a hearing upon the merits of this appeal is concerned, this court accepts the decision of the Illinois Supreme Court based on local law not involving Federal Constitutional questions as not being review-

able in this court. *Hibben* v. *Smith,* (1903), 191 U. S. 310; *Campbell* v. *Olney,* (1923), 262 U. S. 352. The question whether the ordinance conflicts with the Constitution of Illinois has been settled by the decision of the Supreme Court of Illinois holding that it does not. *Carstairs* v. *Coebron,* (1904), 193 U. S. 10; *Louisville Gas & Electric Co.* v. *Coleman,* (1928), 277 U. S. 32. The highest court of Illinois has determined that the appellee city has the power to adopt the ordinance and that the acts of appellant amount to a violation thereof, and this determination is not therefore within the scope of the review by this court. *Fischer* v. *St. Louis,* (1904), 194 U. S. 361; *City of Chicago* v. *Waters,* 363 Ill. 125, 1 N. E. (2d) 396, R. 45. So also, the construction of the ordinance by the highest court of Illinois must be accepted by this court when testing the validity of the ordinance under the Federal Constitution. *Wong Ham Wah Co.* v. *Industrial Commission,* (1921), 255 U. S. 445. The Supreme Court of Illinois has held that the sale of the coal took place in Chicago and that Hauge was the agent of the seller of the coal. *City of Chicago v. Waters,* 363 Ill. 125, 129, 1 N. E. (2d) 396, R. 45.

The merits of this appeal, therefore, present for review only the question whether the ordinance is violative of section 1 of the Fourteenth Amendment to the Constitution of the United States:

The ordinance is a valid exercise of the police power.

Laws and ordinances of the character of the one here under consideration have been considered lawful exercises of the police power and free from successful attack on the ground of violating the Fourteenth Amendment.

The inhibition upon the deprivation of property without due process of law is not violated by the legitimate use of the legislative power of a State or a municipality in

securing the public safety, health, morals, general welfare or general prosperity. *New York etc. R. Co.* v. *Bristol,* (1894), 151 U. S. 556, 567. *Chicago etc. R. Co.* v. *Illinois,* (1906), 200 U. S. 561.

In *Merchants Exchange* v. *Missouri,* (1919), 248 U. S. 365, a State law which forbade, under penalties, any person other than a duly authorized and bonded State weigher to issue any weight certificate for grain weighed at any warehouse or elevator where State weighers were stationed, or to charge for such weighing or certificates, was upheld against attack on the ground that it was inconsistent with the due process and equal protection clauses of the Fourteenth Amendment, as applied to a local board of trade which weighed grain and issued weight certificates, for a charge, at the request of its members.

In *House* v. *Mayes,* (1911), 219 U. S. 270, this Court held that a State might require the sale and delivery of a commodity to be by actual weight and might prohibit arbitrary deductions under rules of associations, without depriving the members of such associations of their liberty of contract or of their property without due process of law.

In *McLean* v. *Arkansas,* (1909), 211 U. S. 539, was upheld the validity of an act to provide for the weighing of coal as it comes from the mine and before it passed over a screen. The court held that, while the police power is subject to judicial review, liberty of contract guaranteed by the Fourteenth Amendment is not universal, but is subject to legislative restrictions, and that the legislature of a State is primarily the judge of the necessity of exercising the police power and courts will only interfere in case the act exceeds legislative authority. The fact that the court doubts its wisdom or propriety affords no grounds for declaring a State law unconstitutional or invalid.

In *Pittsburgh, etc., Coal Co.* v. *Louisiana,* (1895), 156 U. S. 590, this Court upheld, against attack on the ground that it worked an unconstitutional discrimination, an act which provided for the appointment of coal and coke boat gaugers and making it compulsory upon all persons selling coal or coke in a barge to have the same inspected and gauged according to the provisions of the act. The opinion delivered by Mr. Justice Field states (p. 600):

> "Nor is there any discrimination in the transportation of the coal and coke from Alabama and that from Pennsylvania, as in any respect impairs the efficiency of the laws of Louisiana. The difference between the transportation of the coal and coke from Pennsylvania and from Alabama is only the difference arising from one being transported by water and the other by land. There is a difference arising between water and land carriage, arising from the nature of the two modes, but not one created by legislation, direct or indirect, or by any efforts of the state legislature to give or recognize a discrimination in the case of either."

Mr. Justice Herrick of the State Court was therefore right when he said in the case at bar:

> "The circumstance that has brought about the controversy here is, after all, one of transportation."

While there may be a difference in the method of transacting business between resident Chicago coal dealers and nonresident truckers of coal from downstate mines, it is not one created by Chicago's ordinance or by any efforts of the City Council to give or recognize a discrimination in the case of either. The ordinance operates equally upon all those selling and delivering load lots of coal, by weight, within the city. It is thought that the *Pittsburgh, etc. Coal Co.* case is controlling upon the case at bar.

In *Cotting* v. *Kansas City Stock Yards Co.*, (1901), 183 U. S. 79, with reference to the equal protection clause, this Court said (p. 110):

> "That constitutional provision does not, it is true, invalidate legislation on the mere ground of inequality in actual result."

See also *Merchants Bank* v. *Pennsylvania,* (1897), 167 U. S. 461, 463; *Jeffery Mfg. Co.* v. *Blagg,* (1915), 235 U. S. 571, 577.

Appellant Hauge is in the same relation to the purpose of the ordinance that Chicago coal dealers are in, and this Court in *Ohio* v. *Dollison,* (1904), 194 U. S. 445, 447, held that an objection that a statute denies equal protection can only be sustained if it treat one party differently from what it does others who are in the same relation to the purpose of the statute.

In the case of *Schmidinger* v. *City of Chicago,* (1913), 226 U. S. 578, the validity of Chicago's ordinance prescribing standard sizes of loaves of bread and prohibiting the sale of other sizes was attacked, on the ground that it violated the due process of law, the freedom of contract and the equal protection clauses of the Fourteenth Amendment. In affirming the judgment of the Supreme Court of Illinois, this Court held that there was no absolute liberty of contract; that limitations thereon by police regulations of a city are frequently necessary in the interest of public welfare and do not violate the freedom of contract guaranteed by the Fourteenth Amendment.

Gundling v. *City of Chicago,* (1900), 177 U. S. 183, involved the validity of Chicago's cigarette license ordinance. In holding that the enactment of the ordinance violated no provisions of the Federal Constitution, this Court said (p. 188):

> "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be or to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

Statutes and ordinances such as the one before the Court which seek to protect buyers by requiring that certain commodities be weighed upon public (or licensed) scales, by public (or licensed) weighers, are common and have regularly and generally been upheld as valid police regulations. Note in 51 L. R. A. (N. S.) 731.

> "Legislation of this character, as for instance where it requires commodities to be weighed by the public weigher, is regarded as within the police power of the state, and as not violating any common right." Ruling Case Law, Vol. 28, Chap. on "Weights and Measures," Par. 5, p. 5.

See also Ann. Cas. 1912-C, pp. 255, 256; Ann. Cas. 1918-D, p. 159; Dillon on Municipal Corporations, 5th ed., Sec. 710; Freund on Police Power, Secs. 273-275; McMillan on Municipal Ordinances, Sec. 485.

ARKANSAS: In *Taylor* v. *Pine Bluff*, (1879), 34 Ark. 603, the Supreme Court of Arkansas held that the munici-

pality had power to require parties selling coal in the city to weigh the coal on scales provided by the city and to pay a reasonable fee for the weighing, but that the particular ordinance was void because the fees were intended for revenue purposes and not regulation only. In *Wills* v. *City of Fort Smith,* (1902), 70 Ark. 221, 66 S. W. 922, the Court sustained the validity of an ordinance of the City of Fort Smith making it unlawful for any person thereafter to sell any coal in the city without first weighing it upon the city's scales and paying the weighmaster a fee for the weighing of each load. In *Petty* v. *State,* (1912), 102 Ark. 170, 143 S. W. 1067, the Court upheld a statute of the State of Arkansas providing for the election of county cotton weighers and prohibiting any person other than the county weigher or his deputy from weighing any cotton sold in the town or village where the cotton weigher kept his scales.

CALIFORNIA: A note in Ann. Cas. 1918-D, page 160, cites *Scott* v. *Boyle,* (1912), 164 Cal. 321, 128 Pac. 941 (involving an ordinance of the City of San Francisco), and *Milliken* v. *Meyers,* (1914), 25 Cal. App. 510, 144 Pac. 321, (involving an ordinance of the City of Los Angeles), for the proposition that "legislation which requires the weighing and measuring of certain bulky commodities by public officers appointed for the purpose has been held to be a reasonable exercise of the police power." Both cases, however, involved the right of city sealers to salary, and while the ordinances were both upheld, neither of them, so far as appears from the opinions, provided for compulsory weighing by public weighmasters.

GEORGIA: In *City of Cartersville* v. *McGinnis et al.,* (1914), 142 Ga. 71, 82 S. E. 487, the Supreme Court of Georgia held an ordinance invalid because of a section making the decision of a public weigher determinative

of the weights as between the buyer and seller. As to all other contentions made against the ordinance, however, the Court sustained its validity. The ordinance required that all cotton, hay, grain, produce or other articles sold in bulk from wagons or other vehicles be weighed by the public weigher before sold, the public weigher to make out a certificate and collect a fee for each weighing. In *Austin et al.* v. *Atlanta,* (1922), 28 Ga. App. 702, 113 S. E. 113, (certiorari denied by Supreme Court of Georgia) the court upheld a municipal weighing ordinance under the following circumstances. One Austin and the Standard Coal Company were charged with selling coal without weighing it and without furnishing a written statement of weight, in violation of the ordinance. The evidence showed that the coal, under an express contract between the seller and the purchaser, was not to be sold by weight but by measure. Although the coal was sold as "two tons" at a stated price per ton it was sold by a two-ton truck or wagon load for the purpose of saving expense and enabling purchasers to obtain coal at a lower price than the prevailing prices. A car load of coal had been weighed and was divided among purchasers named on a list in proportions of one or more tons without reweighing. The same contention was made there as is being made by appellant in the case at bar, that is, that the purpose of the transaction was to enable purchasers to obtain cheap coal. The court held, however, that the ordinance expressly required that the coal be weighed and that under it all coal must be weighed, regardless of whether or not the purchaser signed an order waiving the weighing.

ILLINOIS: In *City of Savanna* v. *Robinson* (1898), 81 Ill. App. 471, the Appellate Court, Second District, held invalid an ordinance of the City of Savanna requiring all coal sold in the city to be weighed by the city weighmaster

on the ground that the legislature had not granted power to cities in Illinois to pass such an ordinance. The Court said, however:

> "The authority is abundant, and it is conceded by counsel, that the legislature has the power to authorize cities to erect scales, appoint a weighmaster and require all coal sold or offered for sale in the city limits, to be first weighed by such weighmaster; * * *" (p. 478.)

This case was, of course, overruled by the decision of the Supreme Court of Illinois in *City of Chicago* v. *Wisconsin Lime & Cement Company,* (1924), 312 Ill. 520 and in the instant case.

IOWA: In *Davis* v. *Town of Anita* (1887), 73 Iowa 325, 35 N. W. 244, the Supreme Court of Iowa sustained the validity of an ordinance of the Town of Anita declaring certain scales in the town to be "city scales," providing for the appointment of a suitable person as weighmaster, and further providing that it should be unlawful for any person to sell certain commodities sold by weight when the quantity of the article exceeded 1,000 pounds without having the article weighed upon the city's scales. In *State* v. *Smith* (1903), 123 Iowa 654, 96 N. W. 899, the Court upheld an ordinance establishing and regulating a city market, providing for city scales, and requiring all hay, straw, oats or corn sold within the city and for consumption therein to be weighed on the city scales.

KENTUCKY: In *Collins* v. *City of Louisville* (1841), 41 Ky. Rep. (2 B. Mon.) 134, an ordinance of the City of Louisville was held invalid solely for the reason that the fees charged were manifestly a tax on the commodity. The Court conceded for the purpose of the argument that the city had power to compel the measurement of all coal

vended in the city and to require the vendor to pay for the measurement.

MINNESOTA: In *State ex rel. Stone* v. *Eck* (1913), 121 Minn. 202, 141 N. W. 106, the Supreme Court of Minnesota sustained the validity of an ordinance of the City of Crookston making it unlawful to buy or sell in the city any hay, straw, coal or firewood sold or bought by weight or measurement without first having the same weighed or measured by the city weighmaster and obtaining his certificate. The ordinance made an exception in the case of quantities of less than 500 pounds or half a cord. In *Vega S. S. Co.* v. *Consolidated Elevator Co.* (1889), 75 Minn. 308, 77 N. W. 973, the Court held that the legislature had no power to make a certificate of weight issued by a state weighmaster conclusive between the parties, but conceded that it might give the certificate a high character as evidence.

MISSISSIPPI: In *Gaines* v. *Coates* (1875), 51 Miss. 335, the Supreme Court of Mississippi upheld an ordinance of the City of Vicksburg which provided that it should not be lawful for any merchant or other person to weigh any bales of cotton with a view to purchasing it or to purchase any bales of cotton after having been weighed in the city by any person other than the city cotton weigher. The office of cotton weigher was created by the charter of the city which made it the duty of the cotton weigher to weigh or cause to be weighed under his direction and authority all cotton sold in the City of Vicksburg.

MISSOURI: In *Sylvester Coal Co.* v. *City of St. Louis* (1895), 130 Mo. 323, 32 S. W. 649, the Supreme Court of Missouri sustained the validity of an ordinance of St. Louis making it unlawful for any person to do any weighing on any scales in the city, and to receive a fee for such weighing, except, *first*, public scales for which a weigher had

been appointed by the mayor; *second,* scales owned by private parties authorized by acts of legislature; and, *third,* all private scales, the weighers of which should have been approved by the mayor and should have taken an oath before the register and filed a bond. The ordinance further made it unlawful for any person to buy or sell hay or stone coal until the same had been weighed by one of the legally authorized weighers and a certificate of the weight thereof given. The provisions of the ordinance are set forth in some detail in the opinion. In *City of St. Charles* v. *Elsner* (1900), 155 Mo. 671, 56 S. W. 291, the Court upheld an ordinance of the City of St. Louis providing for the appointment of weighers for three public scales maintained by the city, and providing further that no person should buy or sell any corn or stone coal in the city in quantities exceeding fifteen bushels or any hay in quantities exceeding 500 pounds until the same should have been weighed by one of the city weighers on one of the city scales and a certificate of the weight given. In *State ex rel. Barker* v. *Merchants Exchange of St. Louis* (1916), 269 Mo. 346, 190 S. W. 903, the Supreme Court of Missouri had before it the statute which was later sustained by this Court in *Merchants Exchange etc.* v. *State of Missouri ex rel. Barker,* 248 U. S. 365. Among other things, the Missouri court said:

> "To say that these laws do not tend to the public welfare would be a traversty upon the law. Thirty-five states of the Union have laws similar to these laws, although they may effect different commodities. Many of them are gray from age. Such laws are usually directed to the chief commodities of the different states. In one it may be coal, whilst in others it is cotton, lumber, tobacco, or some leading product." (p. 905.)

In *City of Lamar* v. *Weidman* (1894), 57 Mo. App. 507, the Kansas City Court of Appeals held invalid one section of an ordinance which provided that if any person other than the city weigher should take a fee for weighing he should be guilty of a misdemeanor. The Court, however, expressly conceded that the city had power to pass an ordinance providing that the seller should not offer a commodity for sale without the production of the municipal weighmaster's certificate (see p. 513).

NEW YORK: In *Stokes & Gilbert* v. *City of New York* (1835), 14 Wend. 87, the Supreme Court of Judicature of New York sustained the validity of an ordinance of the City of New York requiring anthracite coal to be sold by weight, and that it be weighed by weighmasters not exceeding six in number appointed by the common council, and imposing a penalty upon any vendor of coal who should sell any anthracite without its first being thus weighed.

NORTH CAROLINA: In *State* v. *Tyson* (1892), 111 N. Car. 687, 16 S. E. 238, the Supreme Court of North Carolina upheld an ordinance of the town of Norwood providing that its commissioners should elect annually a cotton weigher, that he should be paid eight cents per bale weighed, one-half by the buyer and one-half by the seller, and that any person who sold cotton within its limits without having it weighed as prescribed should be deemed guilty of a misdemeanor. In *City of Raleigh* v. *Sorrell* (1853), 46 N. Car. 49, an ordinance of the City of Raleigh was upheld requiring that all fodder, oats, hay, and other provender sold in the city should be weighed at the public scales, the weighmaster to give a certificate of the weight, and further providing that any one selling these commodities without the same being thus weighed should be fined.

OHIO: In *City of Cincinnati* v. *Broadwell* (1857), 3 Ohio Dec. (Reprint) 286, a decision of a common pleas

court, the Court had before it an ordinance of the City of Cincinnati establishing the office of city weigher, a section of which provided that no person other than the city weigher and his deputies in the city should follow the business of weighing under a penalty of from $5.00 to $10.00. The ordinance did not require individuals to have their merchandise weighed nor did it give the city weigher the right to interpose between the vendor and vendee. The Court held that the council had exceeded its authority by undertaking,

> "to go beyond this, and to interfere with the trade or business, not for the purpose of protecting parties from fraud, but to enforce this."

OKLAHOMA: In *Taylor* v. *Anderson* (1914), 40 Okla. 316, 137 Pac. 1183, the Supreme Court of Oklahoma held invalid a statute providing for reweighing by cotton weighers and making the finding of fact of weight by the cotton weigher conclusive between buyer and seller. The reason for the holding was in the effect given to the finding by the cotton weigher. But the Supreme Court of Oklahoma has held that a municipality may establish public scales and provide for public weighmasters. *Oklahoma City* v. *Colt*, (1913) 40 Okla. 202, 137 Pac. 359.

PENNSYLVANIA: In *O'Maley* v. *Borough of Freeport* (1880), 96 Pa. 24, the Supreme Court of Pennsylvania sustained as valid an ordinance which is described in the opinion as "requiring the weighing of coal and the payment of five cents for each load delivered in said borough."

SOUTH CAROLINA: In *Charleston* v. *Rogers* (1823), 13 S. Car. L. Rep. 293 (2 McCord, 495), an ordinance of the City of Charleston was upheld which required that coal should be sold by the ton, that the coal should be measured in a certain manner by the city inspector at the ex-

pense of 25c a ton, to be paid by the seller, and that any seller who sold coal contrary to the provisions of the ordinance should be fined in an amount equal to the value of the coal thus sold. In *Sumter* v. *Deschamps* (1872), 4 S. Car. 297, the Supreme Court of South Carolina held invalid an ordinance of the Town of Sumter requiring weighing of cotton by the public weigher. The reason for the holding, however, was that such an ordinance was not within the charter power of the city under the state law. In *Barfield* v. *Stevens Mercantile Co.* (1910), 85 S. Car. 186, 67 S. E. 158, the Supreme Court held invalid a statute providing for the election of a cotton weigher at Bethune on the ground that the statute violated the prohibition in the state constitution against special legislation.

TEXAS: In *Davidson* v. *Sadler* (1900), 23 Tex. Civ. App. 600, 57 S. W. 54, the state statute was upheld providing for the election of public weighers and making it unlawful for any factor, commission merchant or other person to employ any other than a public weigher or his deputies to weigh cotton or other merchandise. In *Martin* v. *Foy* (1921), 234 S. W. 698, there is an interesting review of the Texas law on the subject of public weighers, although no holding is made directly applicable to any point raised in the instant case.

WISCONSIN: In *Yates* v. *City of Milwaukee,* (1860), 12 Wis. 673, the Supreme Court of Wisconsin sustained as valid an ordinance of the City of Milwaukee providing that no person should expose for sale any load of hay in certain wards without first having the hay weighed by the attendant of some established and sealed city hay scale within the city limits and obtaining a written certificate of the weight from the attendant. In *Brittingham & Hixon Lumber Co.* v. *City of Sparta* (1914), 157 Wis. 345, 147 N.

W. 635, the Supreme Court of Wisconsin sustained an ordinance of the City of Sparta providing that all coal offered for sale and delivered within the city limits, except in carload lots, should first be weighed on the public city scales by the weighmaster and the weighmaster should give to the owner a written ticket showing the quantity of coal contained in the load. The case is particularly interesting because many of the same contentions that are made by the appellant in the instant case on the score of the unreasonableness of the ordinance were made and ruled upon by the Supreme Court of Wisconsin.

MANITOBA: In the case of *In re Miller* v. *Town of Virden* (1906), 16 Man. 479, an ordinance of the Town of Virden was held valid which provided that all coal sold by weight within the town should be weighed before delivery upon the public weigh scales, etc.

From the foregoing review of cases it will be observed that the power of the state to protect the buyer from short-weighing by compulsory weighing on public or on licensed scales has been sustained in every instance. The only occasions on which such statutes or ordinances have been held invalid have been the result of some particular objectionable feature unconnected with the theory and principle of such legislation. For example, in two cases it has been held that a particular city did not have power under its charter or under the state law to pass such an ordinance. *City of Savanna* v. *Robinson*, 81 Ill. App. 471; *Sumter* v. *Deschamps*, 4 S. Car. 297. In two cases such ordinances have been held invalid because it was obvious that the fees charged for weighing were for revenue and not for the purpose of meeting the expense of regulation. *Taylor* v. *Pine Bluff*, 34 Ark. 603; *Collins* v. *Louisville*, 2 B. Mon (Ky.) 134. In one case a statute made applicable by its terms to

a single city was held within the prohibition of the state constitution against special legislation. *Barfield* v. *Stevens Mercantile Co.*, 85 S. Car. 186, 67 S. E. 158. In several cases, provisions making the weighmaster's finding as to weight conclusive between buyer and seller have been held invalid. *Taylor* v. *Anderson*, 40 Okla. 316, 137 Pac. 1183; *Vega S. S. Co.* v. *Consolidated Elevator Co.*, 75 Minn. 308, 77 N. W. 973; *City of Cartersville* v. *McGinnis*, 142 Ga. 71, 82 S. E. 487. In two cases particular provisions forbidding all weighing except by public weighmasters were held invalid. *City of Lamar* v. *Weidman*, 57 Mo. App. 507; *Cincinnati* v. *Broadwell*, 3 Ohio Dec. Reprint 286.

The ordinance under consideration in the case at bar by its terms affects alike all those who deliver coal and similar commodities in load lots in the City of Chicago. No good reason is seen why nonresidents of the city should be exempted from its provisions when residents are required to conform to them. By enforcing the ordinance against nonresident as well as resident dealers in coal, it cannot, we submit, be held to deny to a nonresident the equal protection of the laws guaranteed by the Fourteenth Amendment. If appellant were relieved of its requirements, then the ordinance might be subject to successful attack by local truckers and dealers on the ground of unlawful discrimination. It is apparent that appellant is not demanding the equal protection of the laws but rather a special privilege under them.

Appellant does not question the constitutionality of the ordinance as applied to Chicago coal dealers. He concedes (Appellant's brief in opposition to motion to dismiss or affirm, p. 25) that the power to enact a reasonable ordinance which regulates methods of weighing coal or other commodities sold in load lots is within the police

power of the municipality, but contends that the ordinance is unreasonable when applied and enforced against him while hauling coal from outside the city. (Appellant's brief in opposition to motion to dismiss or affirm, p. 13.) He claims that because of the enforcement of the ordinance against him, he is required to rehandle the coal in Chicago at an increased cost, and due to the rehandling the coal, which is soft surface mine coal, is broken down and the grade altered. The extravagant contention is then made that this results in the total destruction of appellant's "lawful and legitimate business."

There is of course in the record no evidence to support such a contention by appellant; nothing but the argumentative statement made by Ralph C. McElvain, president of the Morris Coal & Mining Co., who speculates as to the probable cost and effect upon his company's business of complying with the ordinance, by establishing a coal yard in Chicago and weighing coal on scales of Chicago public weighmasters (R. 19). Appellant Hauge is a mere trucker who owns no coal but merely hauls coal for a Chicago coal dealer or agent from a mine located outside the city. He makes no showing by competent evidence that his trucking business would be injuriously affected by the requirement of the ordinance that the coal be weighed on Chicago public weighmasters' scales.

The Chicago coal user needs protection in the matter of dishonest weights when he buys coal from established Chicago coal dealers who are directly under the supervision of the city's Weights and Measures Department. To a greater degree the user needs protection when coal is delivered to him by irresponsible, itinerant, part-time coal truckers, using a miscellaneous lot of vehicles instead of regular coal trucks, from a strip mine sixty-two miles from

Chicago, which mine assumes no responsibility over the truckers (R. 18). If the ordinance were not enforceable against appellant and those similarly situated with him, then the conditions prevailing prior to its enactment, recounted in Point I of this brief, would recur, and practices of fraud, short-weighing and chicanery again prevail and the public would be victimized by the nefarious practices already referred to.

The ordinance can be complied with by any legitimate and honest dealer or trucker.

It is not startling that appellant, who lives in Morris, Illinois, sixty-two miles from Chicago, should find some inconvenience, some expense attached to the business of delivering coal to Chicago consumers. Doubtless it would be more convenient and less expensive to him if he were not required to comply with the terms of the ordinance and if he were relieved from any weighing except that done at the mine. This, however, would not meet the requirements of the ordinance and would not protect the customer, for whose benefit the ordinance was enacted.

Appellant states that he is at a disadvantage compared with persons who own Chicago coal yards and who may become public weighmasters and weigh their own coal. Here he argues a hypothetical case of a downstate coal mine or coal dealer, not a party to this litigation. There is however nothing in Chicago's ordinance which would prevent a nonresident coal company or a nonresident trucker from maintaining a coal yard in Chicago, establishing an agent in the city who might readily qualify and be bonded as a public weighmaster and who might weigh upon his public weighmaster's scales any coal originating from the downstate mine or coal company. Of course, the weighmaster's ordinance has no extraterritorial effect and in

order to be licensed as a public weighmaster the individual would be required to be established in Chicago and subject himself to the regulatory provisions of the city's Weights and Measures ordinance, otherwise he would escape supervision and punishment for misfeasance.

On page 36 appellant comments upon the fact that there is no provision for licensing weighmasters outside of Chicago and he states that prior to the year 1935 the Morris Coal and Mining Company had a license as a public weighmaster which the city refused to renew on the ground that the scale at the mine was not located in Chicago. He then states that it is a fair inference that the real reason that this license was refused was that coal trucked from Morris was becoming a competitve influence in the Chicago market. This is not a fair inference. The proper inference to be drawn from appellee's refusal to license public weighmasters at Morris, Illinois is that the city could not supervise the activities of nonresident weighers functioning outside the city. They would not be subject to prosecution and punishment by the city and there would be no way to protect the public against fraudulent weights and dishonest practices committed outside the city but affecting consumers in the city in the handling of coal by an irresponsible group of truckers.

In this connection appellant cites, on page 36 of his brief, the case of *State* v. *Nelson,* (1896), 66 Minn. 166, 68 N. W. 1066. This case merely held that *an applicant for a license* to sell milk within a city might be required *to consent* that the dairy herd from which he obtained his milk be inspected by the city health commissioner although the herd was kept outside the city. This was a license case involving consent by a nonresident licensee to a city inspection outside the city and most certainly did not hold

that the city could be compelled to inspect herds outside its limits. On the contrary the implication is that the city had no such extraterritorial power but that it could obtain it if the owner of the herd consented and that it could make such consent a condition precedent to the issuance of a license. The case bears no analogy to this case. *Hill* v. *Fetheroff*, (1912), 236 Pa. 70, 84 Atl. 677, cited by appellant on page 37 of his brief, involved the same kind of consent license ordinance and is equally without signifiance here. Appellant argues that since a city may, under these cases go outside its limits with the consent of the licensee, therefore it must do so in this case or else the ordinance is unreasonable. The cases are not authority for any such proposition.

On page 3 of his brief Hauge says that it was not disputed by the city that in order for him to comply with the ordinance it would be necessary to unload the coal within the city to obtain the tare weight of the vehicle, then reload the coal to obtain the gross weight of the vehicle and the coal. The ordinance, of course, speaks for itself. It does not prescribe unloading. The ordinance which regulates public weighmasters (section 3623, R. 41) provides in part as follows:

> "In no case shall any public weighmaster state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight as specified herein."

This leaves the manner and time of ascertaining the tare weight to the public weighmaster. To give value and dependability to the weight certificate it must state the true net weight of the coal, and in order to be able to state the net weight the public weighmaster must ascertain the gross and tare weights before making his certificate. If, due to

the manner in which a nonresident conducts his business and due to his nonresidence, it becomes necessary for him to unload coal in order to enable a weighmaster to get the weight of his vehicle, any attendant expense or inconvenience is a mere incident to the business the nonresident elects to transact in the city. The ordinance itself is not more burdensome upon the nonresident than upon a resident. Chicago coal dealers who receive coal at their city yards by steamer, railroad car or motor truck are required to handle the coal. They must unload and reload it. There is nothing in the ordinance to prevent a nonresident coal company or dealer from establishing a coal yard in Chicago or from securing the appointment of a resident agent as a public weighmaster. There is no discrimination made by the ordinance against a nonresident. It applies alike to all who deliver coal in Chicago in load lots. If it had exempted nonresidents, obviously it would then unlawfully discriminate against residents. If the burden of complying with it is greater in the case of a nonresident it is an incident merely to his nonresidence.

Regarding this point the Illinois Court said (R. 50):

> "The defendants, nonresidents of the city of Chicago, are asking for a practice of weighing, as applied to the business done by them in the city, which under the ordinance here would not apply to those truckers living in the city and delivering coal from the local yards or local dealers in the city to the consumer. To recognize the demand of the defendants would be to discriminate between the local truckmen and dealers in Chicago in favor of non-residents."

A bonded public weighmaster could not truthfully certify the net weight of a load of coal if he could not ascertain

the tare weight of the vehicle. The weighmaster must be given the right to weigh the vehicle at the time he issues his certificate. We have already pointed out, under Point II of this brief, that a weighing at one time to ascertain the gross weight of the coal and the vehicle and a weighing at another time to ascertain the tare weight of the vehicle, with an interval between the two weighings, would not comply with the ordinance or be effective to prevent fraud upon the consumer. To give protection to the purchaser of a truck-load of coal, the ordinance is sound when it requires that a certificate showing the true net weight be delivered before the coal is unloaded into the customer's coal bin or upon his premises and before he is required to pay for the coal, and before an unknown, nonresident trucker departs.

Whether the enforcement of the ordinance injuriously affects the business of the strip mine owned by the Morris Coal and Mining Company is not directly involved in this case. Even were it involved, it is not seen how that company would be entitled to enjoy the business of selling coal in load lots by weight to Chicago inhabitants except under the regulations applicable to all dealers of load lots.

Appellant relies upon the statement contained in the state judges' dissenting opinion to the effect that it is quite as much to the interest of the public welfare that the people of the City of Chicago be afforded access to cheap markets for the necessities of life as it is that weights be watched. We yield to no one in desire to promote the public welfare of the people of Chicago. It is believed that the viciousness of short weighing is not fully understood by the dissenting justices. It is of vastly greater importance to the consumer in the long run that he get full weights and

measures than that he get cheap coal. The cheap coal would cease to be cheap if the weight of it were short.

The decisions of this Court which appellant relies on to sustain his claim of unconstitutionality are *Jay Burns Baking Co.* v. *Bryan,* 264 U. S. 504, 513; *Dobbins* v. *City of Los Angeles,* 195 U. S. 223, 235, 240; *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534, 535; *Weaver* v. *Palmer Bros. Co.* 270 U. S. 402, 412, 415; *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1, 9, 11; *Louis K. Liggett Co.* v. *Baldrige,* 278 U. S. 105, 113. These cases announce the general principle that States, under the guise of protecting the public, cannot *arbitrarily* interfere with private business or *arbitrarily* prohibit lawful occupations or impose *unreasonable and unnecessary* restrictions upon them. We are confident that this Court, when examining the ordinance under review, will not find it to be an arbitrary interference with private business or an arbitrary prohibition against a lawful occupation or that it imposes unreasonable and unnecessary restrictions upon them.

Where, as in the case at bar, the opportunity to defraud the customer in the sale of coal is great and the consumer has no adequate way to protect himself against being cheated, where the delivery of true weights of coal to the consumer is a matter clearly related to the public welfare, where the city has been given express authority to enact the ordinance, where the municipal legislative body knows best what the conditions are that require regulation, where the ordinance bears a reasonable relation to the exercise of the power belonging to the municipal legislative body, where the ordinance affects alike residents and nonresidents of the city and every merchant delivering any commodity in load lots, we respectfully submit that the ordinance before the Court is not susceptible to the charge

made against it of being in violation of the Fourteenth Amendment.

The case of *City of Chicago* v. *Kautz*, (1924), 313 Ill. 196, 144 N. E. 805, cited by appellant in support of his claims that the ordinance arbitrarily interferes with private business, has no bearing upon the case at bar for the reason that we are not here concerned with an attempt to have appellant reweigh his coal after having it once weighed over a Chicago public weighmaster's scales.

On page 25 of his brief appellant cites *May Grain & Coal Co.* v. *Kansas City, Mo.*, (1935), 10 Fed. Supp. 792, a case decided in 1935 by the District Court for the Western District of Missouri, Western Division. This case held that an ordinance which expressly provided that a nonresident coal dealer, who had a coal yard one-half mile outside the city, must establish a coal yard inside the city in order to do business there, was unreasonable and void. The court held the ordinance unreasonable because it appeared that the city could have inspected the yard outside the city without inconvenience and because the administration of the ordinance was discriminatory in that the other nonresident coal dealers were not molested. Even assuming that the decision is sound, the considerations which led the judge to hold as he did are lacking in this case. But more important is the fact that the Chicago ordinance, unlike the Kansas City ordinance, makes no requirement whatever that appellant establish a coal yard in Chicago; there is nothing to prevent appellant from solving the question of how to weigh his coal in any way he sees fit, provided the weighing complies with the ordinance. True, he may establish a coal yard but he need not; he may go to any public weighmaster who has a yard and use that. If he thinks he must have a coal yard it is not the ordinance

which requires it but a situation for which he alone is responsible.

Appellant's charge in Point III of his brief that the City of Chicago is using this ordinance for the improper purpose of protecting local coal dealers from competition is without a particle of evidence to support it and is highly prejudicial and unjust.

Conclusion.

Though difficulty has been met with in answering appellant due to his attempts to overstate the record in this court, it is obvious that he has failed in showing that the ordinance is so unrelated to the public welfare, so unreasonable or arbitrary, so "unmistakably and palpably in excess of legislative power" as to render it violative of the Fourteenth Amendment. All that he has done has been to find fault with the ordinance and argue that it should have been drafted differently and so as not to inconvenience him in his business. A complete answer to him is contained in the pronouncement of this court made when it upheld the validity of Chicago's theater license ordinance in the case of *Metropolis Theatre Co.* v. *Chicago*, (1913), 228 U. S. 61. On page 69 of the opinion Mr. Justice McKenna said:

> "To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations —illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of

> government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void under the Fourteenth Amendment; and such judgment cannot be pronounced of the ordinance in controversy. *Quong Wing v. Kirkendall,* 223 U. S. 59."

Appellant's case presents a legislative matter, not a judicial one.

It is respectfully submitted that the decision of the Supreme Court of Illinois upon the constitutionality of the ordinance is sound and that the judgment of that court should be affirmed.

BARNET HODES,
Corporation Counsel.
MARTIN H. FOSS,
Assistant Corporation Counsel.
Attorneys for Appellee,
City of Chicago.

FILE COPY

Office - Supreme Court, U.
FILED
NOV 9 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 175

MARCUS HAUGE,

Appellant,

vs.

CITY OF CHICAGO, a Municipal Corporation,

Appellee.

APPLICATION TO PASS CASE AND STIPULATION OF THE PARTIES.

IRWIN T. GILRUTH,
THOMAS C. McCONNELL,
OWEN RALL,
Attorneys for Appellant.

BARNET HODES,
Corporation Counsel,
MARTIN H. FOSS,
Assistant Corporation Counsel,
Attorneys for Appellee.

CHAMPLIN-SHEALY COMPANY, CHICAGO 365

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 175

MARCUS HAUGE,

Appellant,

vs.

CITY OF CHICAGO, a Municipal Corporation,

Appellee.

APPLICATION TO PASS CASE.

MAY IT PLEASE THE COURT:

The appellant, Marcus Hauge, and the appellee, City of Chicago, join in this application and respectfully move the court to pass the above entitled cause to the session of the court beginning Monday, December 7, 1936. In support of their motion they state the following:

On, to-wit, October 12, 1936, this court entered its order postponing further consideration of the question of its jurisdiction and of the motion of appellee to dismiss or

affirm to the hearing upon the merits. Until this order was entered it was not possible to order printing of the record in this case.

The Clerk of this court has informed counsel that the case will probably be reached for oral argument during the week of November 16, 1936.

The printed record was not received by counsel until November 2, 1936.

Because the printed record was not sooner available counsel for appellant have been unable to prepare, serve and file their brief three weeks prior to November 16, 1936. Since Rule 27 of this court provides that the appellant's brief must be filed at least three weeks prior to the date of the oral argument, sufficient time as contemplated by such rule in which to prepare appellant's brief is not provided if the cause is reached for oral argument at the time suggested by the Clerk, and as a consequence counsel for appellee—should the case be heard during the week beginning November 16, 1936—will be deprived of the two weeks' time allowed by said rule for the filing of their brief.

The parties by their counsel therefore respectfully petition the court to enlarge the time within which appellant may file his brief herein to and including November 14, 1936 and the time within which appellee may file its brief herein to and including November 30, 1936, and to postpone the hearing of said cause to a date within the session of the court beginning December 7, 1936.

In support of this application the parties hereto present their stipulation agreeing to the above mentioned enlargement of time and the postponement of the hearing of said cause.

IRWIN T. GILRUTH,
THOMAS C. MCCONNELL,
OWEN RALL,
Attorneys for Appellant.
BARNET HODES,
Corporation Counsel,
MARTIN H. FOSS,
Assistant Corporation Counsel,
Attorneys for Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 175

MARCUS HAUGE,

Appellant,

vs.

CITY OF CHICAGO, a Municipal Corporation,

Appellee.

STIPULATION.

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective counsel, that the time within which appellant is permitted to file his brief herein may be enlarged to and including November 14, 1936, and that the time within which the appellee may file its brief herein may be enlarged to and including November 30, 1936.

It is further stipulated and agreed that the above entitled cause may be passed and be heard within the session of the court beginning December 7, 1936.

IRWIN T. GILRUTH,
THOMAS C. MCCONNELL,
OWEN RALL,
Attorneys for Appellant.
BARNET HODES,
Corporation Counsel,
MARTIN H. FOSS,
Assistant Corporation Counsel,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 175.—October Term, 1936.

Marcus Hauge, Appellant,
vs.
The City of Chicago, Appellee.

Appeal from the Supreme Court of the State of Illinois.

[January 4, 1937.]

Mr. Justice McReynolds delivered the opinion of the Court.

Appellant, while residing at Morris, Illinois, engaged in trucking coal for hire from a mine near that place sixty-two miles over public roads to Chicago where he delivered it to consumers. He both owned and drove the truck.

The Revised Statutes of Illinois, (1935) Ch. 24, Art. V, Secs. 54, 55, 56, 91, give cities power to regulate inspection, weighing and measuring of coal, inspection and sealing of weights, measures, etc. Ch. 147 provides for inspecting and sealing scales by State officers; but no law permits designation of State weighmasters.

Chicago by ordinance has authorized the appointment of weighmasters and prescribed their duties. Rev. Code (1931) Secs. 525, 526, 2939, 2947, 2950, 3612, 3623.

Section 2947[1] requires that merchandise "sold in load lots by weight, delivered by wagon, truck or other vehicle within the city,

[1] Section 2947:

"Every load of any commodity, produce or other article or articles of merchandise sold in load lots by weight, delivered by wagon, truck or other vehicle within the city, shall be weighed by a public weighmaster; a certificate of weight for each such load, issued by such public weighmaster, shall be delivered by the driver or person in charge of the wagon, truck, or other vehicle used in the delivery, to the purchaser or consignee of such load, or to his or their agent at the time of the delivery and before any of the commodity, produce or other article or articles of merchandise is removed from the vehicle, or such certificates shall be delivered to the inspector of weights and measures, or any of his deputies upon his or their demand. When delivery is made, in case no person is present to receive such commodity, produce or other article or articles of merchandise, and if the purchaser or consignee, or his or their agent, cannot be located, then the memorandum or certificate of weight hereinbefore provided for shall be posted conspicuously at the place of delivery before any of the commodity, produce or other article or articles of merchandise is removed from the vehicle."

shall be weighed by a public weighmaster" and that his certificate showing weights shall be delivered to the purchaser or consignee. Section 3612 permits appointment, as weighmaster, of any one owning scales under prescribed conditions; and Section 3621[2] fixes permissible charges. Section 3623[3] directs: "In no case shall any public weighmaster state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight as specified herein . . ."

The Chicago Municipal Court adjudged appellant guilty of violating Section 2947 by delivering coal trucked directly from the mine at Morris to a consumer in Chicago without having obtained a weighmaster's certificate showing the gross, tare, and net weights. The coal had been weighed at the mine upon scales duly tested by the State. He claimed the ordinance, as applied to his business, unreasonably required rehandling of coal already properly weighed and therefore offended the Fourteenth Amendment.

The Supreme Court of Illinois affirmed the judgment of conviction. It upheld the view that under Secs. 2947 and 3623 coal brought by truck directly from the mine to the consumer in Chicago, although weighed at the mine on State tested scales, must be unloaded within the city, in order to permit a public weighmaster there to weigh the empty truck, and then reloaded so that both truck and load may be weighed by the same official. The prescribed certificate can issue only after such double weighing.

The Court declared that so construed the ordinance did not conflict with the Fourteenth Amendment and that ruling is the basis for the only question presented for our determination. Violation of the ordinance as written is admitted. Also that it is not unreasonable as applied to dealers operating coal yards within Chicago.

---

[2] Section 3621:

"Public weighmasters, when not the owners or sellers of the articles, commodities or produce weighed by them, shall be entitled to charge and receive a sum not in excess of twenty-five cents for each and every load or part of load (or lesser quantity when not contained in any wagon, truck or other vehicle), of any commodity, produce, article or articles of merchandise weighed by them over the scales of such public weighmasters."

[3] Sec. 3623:

"Each public weighmaster shall issue a weight certificate, signed by him or his deputy, under his official seal, which certificate shall state thereon the following: The commodity, produce, article or articles weighed; the date; the name of the weighmaster or deputy weighmaster who did the weighing; the name and address of the person, firm or corporation for whom the weighing

Counsel maintain that appellant's business differs materially from the business of those who operate local coal yards; that the questioned ordinance is unreasonable in requiring coal weighed upon State inspected scales to be unloaded and reweighed before delivery, since weights could be adequately verified by practical methods not involving this expensive and burdensome proceeding; also that the ordinance unduly discriminates between those who truck coal directly from the mine and dealers with yards within the city.

In *City of Chicago* v. *Wisconsin Lime Co.*, (1924) 312 Ill. 520, the Supreme Court affirmed the power of Chicago to enact the challenged ordinance and pointed out that it "was designed to protect the purchasing public against what has been universally regarded as a widespread evil in the selling of commodities in load lots by weight and it contained effective means for the prevention of the evil."

Below, that Court said: "The opportunity to defraud the consumer in the sale of coal in load lots is great and the consumer has no adequate way to protect himself against being cheated. The delivery of true weights of coal to the consumer is a matter clearly related to the public welfare and the city has the right to adopt reasonable ordinances therefor." "The defendants, non-residents

was done; the name of the driver of the vehicle bringing such commodity, produce, article or articles to the scales, or, if the same is not contained in a vehicle, the name and address of the person bringing the same to the scales; where contained in a vehicle, the kind of vehicle and the name and address of the purchaser or consignee of the commodity weighed; when the commodity is loaded in a vehicle, the total or gross weight of the commodity weighed and the conveyance in which it is loaded, together with the driver and any other person who may be on the vehicle when weighed, and of the horses, if a horse-drawn vehicle and the horses are weighed; the tare weight or the weight of the vehicle, including driver and any other person who may have been on the vehicle when weighed while loading and including the horses if they were weighed when the loaded vehicle was weighed; the net weight of the commodity, produce, article or articles contained in such vehicle, or the net weight of the commodity, produce, article or articles when not contained in a vehicle at the time of weighing. In no case shall any public weighmaster state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight as specified herein; provided, however, that in the case of a divided load, by which is meant a load containing more than one order for the same or different purchasers or consignees, no penalty shall be imposed under this chapter by reason of the fact that the tare weight shown on the weight certificates is only the original tare weight of the vehicle and equipment before loading if in such case each order has been weighed separately and the net weight of each separate order or delivery is correctly shown on the weight certificate and such correct net weight is delivered."

of the city of Chicago, are asking for a practice of weighing, as applied to the business done by them in the city, which under the ordinance here would not apply to those truckers living in the city and delivering coal from the local yards or local dealers in the city to the consumer." "Where a city has enacted an ordinance within its charter or granted powers regulating a business, the non-residents who desire to follow such business within such municipality must conform to the requirements of the ordinance."

For many years, by admission, Chicago has rightly required local truckmen to comply with the ordinance. Since the evil to be prevented is no less imminent when coal comes by truck from without the city, a like requirement as to this seems equally important. The ordinance makes no discrimination of which appellant can complain; and no adequate reason has been suggested for concluding that although valid as to local truckers it violates rights guaranteed to him by the Fourteenth Amendment.

That the coal delivered by appellant was weighed at the mine on tested scales is stressed; but this is not really material. Chicago had no control there and such weighing afforded no adequate protection against fraud. The opportunities for manipulation thereafter are obvious. Invalidity of the ordinance cannot be established by suggesting some other less burdensome procedure, which possibly might accomplish the end in view—honest delivery weights. The city may act with proper legislative discretion. Here there is nothing to show action so arbitrary, unreasonable or discriminatory as to require us to overthrow its deliberate effort to meet a plain evil. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357; *Armour & Co.* v. *North Dakota*, 240 U. S. 510, 513, 515; *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 415.

The challenged judgment must be affirmed

Affirmed.